INTERNATIONAL COURT OF JUSTICE

THE JADHAV CASE

THE REPUBLIC OF INDIA v. THE ISLAMIC REPUBLIC OF PAKISTAN

COUNTER-MEMORIAL OF THE ISLAMIC REPUBLIC OF PAKISTAN

13TH DECEMBER 2017

EXHIBIT

VOLUME 3: ANNEXURES 45 – 74

Jadhav Case (India v Pakistan)

Counter-Memorial on behalf of the Islamic Republic of Pakistan

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13th December 2017

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International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2008

Public sitting

held on Thursday 19 June 2008, at 3 p.m., at the Peace Palace,

President Higgins presiding,

***in the case concerning the* Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning *Avena and Other Mexican Nationals (Mexico v. United States of America)* (Mexico v. United States of America)**

VERBATIM RECORD

ANNÉE 2008

Audience publique

tenue le jeudi 19 juin 2008, à 15 heures, au Palais de la Paix,

sous la présidence de Mme Higgins, président,

***en l'affaire relative à la* Demande en interprétation de l'arrêt du 31 mars 2004 en l'affaire *Avena et autres ressortissants mexicains (Mexique c. Etats-Unis d'Amérique)* (Mexique c. Etats-Unis d'Amérique)**

COMPTE RENDU

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11. Thank you, Madam President, Members of the Court. I would ask that the Court now call upon Mr. Vaughan Lowe.

The PRESIDENT: Thank you, Mr. Mattler. Mr. Lowe.

Mr. LOWE:

Abuse of process

1. Madame le président, Membres de la Cour, c'est un privilège de me trouver à nouveau devant cette Cour, et de m'être vu confié la défense de cette partie des plaidoiries faite au nom des Etats-Unis.

2. Il est courant, pour les affaires plaidées devant cette Cour, que les parties en cause soient représentées par une combinaison d'avocats anglophones et francophones. Malheureusement, dans le peu de temps qui nous a été imparti, il n'a pas été possible de rassembler une équipe qui puisse refléter avec satisfaction les deux langues officielles de travail de cette Cour.

3. Je vais donc continuer l'argumentation de ma plaidoirie en anglais, la langue dans laquelle j'espère pouvoir développer le plus clairement possible les points importants que je me dois de vous présenter.

4. My colleagues have demonstrated that as a matter of law there is no dispute between Mexico and the United States in relation to the interpretation of the *Avena* Judgment. They have submitted that the consequence as a matter of law is that the case is moot, and that the Court lacks jurisdiction over it. Put in other words, there is no prima facie jurisdiction over the Mexican Application for an interpretation of the Judgment. In fact the position is even clearer than that. It is evident that the Court does *not* have jurisdiction. And in these circumstances, there is no basis upon which the incidental request for provisional measures can stand, and it must be dismissed. My submissions take a slightly different approach. In his separate opinion in the *Northern Cameroons* case, Sir Gerald Fitzmaurice made a trenchant observation in relation to preliminary objections. He said that there are

> "objections, not in the nature of objections to the competence of the Court, which can and strictly should be taken in advance of any question of competence. Thus a plea that the Application did not disclose the existence, properly speaking, of any legal dispute between the parties, must precede competence, for if there is no dispute, there

> is nothing in relation to which the Court can consider whether it is competent or not. It is for this reason that such a plea would be rather one of admissibility or receivability than of competence." (*Northern Cameroons (Cameroon* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1963*, p. 105)[44].

And Sir Gerald went on to make a point which goes to the heart of the issue in this hearing. He referred to the position which arises

> "where the objection touches not so much the substance of the claim, as the character of what the Court is requested to do about it, having regard to the surrounding circumstances — as for instance if the Court is asked to do something which does not appear to lie within, or engage, its judicial function as a court of law. In cases of this kind, the question of competence or jurisdiction becomes irrelevant, for it would be inappropriate, and even misleading, for the Court to avoid the issues by simply finding itself to lack jurisdiction, even if it did lack it; or alternatively, to find itself to be competent when it was manifest that it could not in any event exercise that competence for *a priori* reasons touching the whole nature of its function as an international tribunal and judicial institution." *(Id.)*[45]

5. Well this, in our submission, is precisely the situation here. The absence of any real dispute certainly goes to the question of the Court's jurisdiction, and as my colleagues have shown the Application can be dismissed on that ground. But there is another way to approach these proceedings. And it is to say that the leading objection is that Mexico has manufactured an alleged dispute over the interpretation of the *Avena* Judgment, and has compounded the artifice because what it has requested the Court to do in relation to that fictitious dispute is in fact something quite different from the issue of a clarification — a wholly unnecessary clarification — of its earlier Judgment.

6. No one is in any doubt as to the seriousness of the question of the death penalty. But there is also a serious question concerning the propriety of attempting in this way to involve the

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[44]French text:

"d'autres exceptions n'ayant pas le caractère d'exceptions à la compétence de la Cour qui peuvent et, à strictement parler, doivent être examinées *préalablement* à toute question de compétence. Ainsi, une exception d'après laquelle la requête n'a pas révélé qu'il existait véritablement un différend entre les parties doit être discutée avant la compétence, car, s'il n'y a pas de différend, il n'y a rien à propos de quoi la Cour puisse envisager sa compétence ou son incompétence. C'est pour cette raison qu'une telle exception concernerait plutôt la recevabilité que la compétence."

[45]French text:

"lorsque l'exception porte moins sur le fond de la demande que sur le caractère de ce que la Cour est priée de faire à ce sujet eu égard aux circonstances — cela se produit par exemple si la Cour est invitée à faire quelque chose qui n'implique pas ou ne met pas en jeu la fonction judiciaire qui est la sienne comme tribunal. Dans des cas de ce genre, la question de compétence ou de juridiction devient sans pertinence, car il serait inapproprié et même fallacieux que la Cour élimine la question simplement en constatant qu'elle n'a pas compétence, même si c'est bien le cas; ou que la Cour s'estime compétente alors qu'il est manifeste qu'elle ne peut en toute hypothèse exercer cette compétence pour des raisons générales a priori touchant à la nature de sa fonction comme tribunal international et institution judiciaire."

International Court in the matter. The Application for interpretation is in reality no more than a vehicle for a request that the Court issues orders which will not *interpret* the Judgment — as to whose meaning there is no dispute or doubt whatsoever — but will be directed solely to increasing pressure on the United States to comply with the *Avena* Judgment. The Court is requested by Mexico to engage in what is in substance the enforcement of its earlier judgments and the supervision of compliance with them. And that, in our submission, is an abuse of process, and Mexico's Application should be dismissed for that reason.

7. In developing this submission, Madam President, I have six propositions to put before you. They are these:

1. That the Court has an inherent power to regulate its own proceedings in the interests of justice and in order to safeguard the integrity of the Court.
2. That that power includes the power to dismiss applications where they amount to an abuse of process.
3. That the Court is not bound by the party's characterization of its application.
4. That where a party asserts that it is making an Application to the Court for a judgment or order for a specific purpose and the Court considers that the party is in reality pursuing some different purpose which takes the application outside the scope of the provision on which it is purportedly based, then the Court is entitled to dismiss that application.
5. And specifically, that where it appears to the Court that a party is making an application for a judgment or order solely for the purpose of bringing pressure upon the other party to comply with an earlier Judgment or Order of the Court, the Court is entitled to reject the application on the ground that it amounts to an abuse of process.
6. And finally, that the Court may dismiss an application in the circumstances that I have described at any stage in the proceedings, because the dismissal is an exercise of the Court's inherent power to regulate its own proceedings in the interests of justice and in order to safeguard the integrity of the Court.

8. In our submission, those are all sound propositions of international law, and their application in this case should lead to the dismissal of Mexico's Application for interpretation and of this request for provisional measures.

9. I shall deal with the six propositions one by one.

Proposition 1: The Court has an inherent power to regulate its own proceedings in the interests of justice and in order to safeguard the integrity of the Court

10. There is no specific provision in the Court's Statute which would entitle it to dismiss Mexico's Application on the grounds that I have briefly outlined. And we rely upon the existence of an inherent power in the Court to regulate its own proceedings.

11. There is no doubt that tribunals have inherent powers and I think that our Mexican friends accept this. The existence of those powers is a necessary and obvious corollary of the responsibility of the tribunal for the proper and orderly discharge of its responsibilities. As was observed in the separate opinion of a Member, now President, of this Court in the case of the *Legality of the Use of Force*, "[t]he Court's inherent jurisdiction derives from its judicial character and the need for powers to regulate matters connected with the administration of justice, not every aspect of which may have been foreseen in the Rules" *(Legality of Use of Force (Serbia and Montenegro* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 2004*, p. 1359, para. 10.)[46]

12. That separate opinion refers to occasions on which this Court has recognized and exercised that inherent power. And so too, does the separate opinion of Judge Koojimans in the same case, where he spoke of the use of the power "as an instrument of judicial policy to safeguard the integrity of the Court's procedure" (*id.,* para. 22)[47]. Both of those opinions refer to the power of the Court to reject applications in *limine litis*, and to the appropriateness of doing so in cases where it is necessary to do so for "the sound administration of justice" (to borrow the language used by the Court in 1999 when it ordered the removal from the List of the case brought by Yugoslavia against Spain) (*Legality of Use of Force (Yugoslavia* v. *Spain), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999*, p. 761, para. 35).

13. I will not detain the Court by adding to the list of authorities bearing on the question of the existence of inherent powers of tribunals, though I would respectfully commend to the Court

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[46]French text: "Les pouvoirs inhérents de la Cour découlent de son caractère judiciaire et du fait qu'elle doit disposer de moyens pour réglementer des questions liées à l'administration de la justice, dont tous les aspects peuvent ne pas être prévus par le Règlement."

[47]French text: "comme un instrument de politique judiciaire afin de préserver l'intégrité de sa procédure".

the analyses of the question by Professor Paola Gaeta, published in the *Festschrift* for Judge Antonio Cassese, and by Dr. Chester Brown, published in the *2005 British Year Book of International Law,* copies of which we can make available to the Court and have passed or will pass to our friends on the other side.

14. I will turn instead to the second proposition, that the Court has an inherent power to dismiss applications where they amount to an abuse of process.

Proposition 2: That power includes the power to dismiss applications where they amount to an abuse of process

15. It is almost tautological to say that a tribunal has the power to dismiss an application which is an abuse of its process. Sometimes that power is spelled out explicitly. For example, Article 294, paragraph 1, of the 1982 United Nations Law of the Sea Convention stipulates that any of the courts or tribunals to which an application is made in respect of certain disputes under that Convention

> "shall determine at the request of a party, or may determine *proprio motu*, whether the claim constitutes an abuse of legal process or whether prima facie it is well founded. If the court or tribunal determines that the claim constitutes an abuse of legal process or is prima facie unfounded, it shall take no further action in the case."

16. Similarly, Article 35 of the European Convention on Human Rights stipulates that the European Court of Human Rights "shall declare inadmissible any individual application . . . which it considers incompatible with the provisions of the Convention or the protocols thereto, manifestly ill-founded, or an abuse of the right of application", and that it may do so "at any stage of the proceedings".

17. Now the power to dismiss applications for abuse of process, even if it is not expressly conferred by the tribunal's constituent instrument, we believe exists as an inherent power. Professor Zimmerman's Commentary on the Statute of this Court says:

> "Abuse of procedure is a special application of the prohibition of abuse of rights, which is a general principle of international law as well as in municipal law. It consists of the use of procedural instruments or rights by one or more parties for purposes that are alien to those for which the procedural rights were established."[48]

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[48] Andreas Zimmermann and Tobias Thienel, Article 60, in *The Statute of the International Court of Justice: A Commentary*, 831 (Andreas Zimmermann *et al*. dds., 2006).

18. The principle of abuse of rights is itself well established in international law, and may be regarded as one of the general principles of law recognized by civilized nations, which the Court is directed to apply by Article 38 of its Statute. Again, time constraints preclude what is probably an unnecessary recitation of the practice and case law which establishes the status of abuse of rights as a general principle of law. Again, we can make available to the Court and will pass to our friends on the other side the relevant pages of the classic studies by Professor Bin Cheng[49], Professor Elisabeth Zoller[50], and a recent study by Professor Byers[51], in which references to a good deal of this practice are assembled.

19. The power to dismiss on the ground of abuse of legal process has, in our submission, two distinct bases. One is that the power is a corollary of the responsibility of the Court which it has to safeguard the integrity of its procedure. To put the point plainly, Madam President, and with all due respect, if the Court does not preserve the international judicial process against abuse, who else will? There is no system of appeal. One can scarcely address issues of this kind by amending the Statute of the Court. And if the Court does not defend itself, and also the States parties to its Statute, from attempts to abuse its processes and distort its role, who else can do so? The Court *must* have the power to dismiss applications which amount to abuses of its process.

20. The second basis for the power to dismiss is that it is an aspect of the general duty of loyalty between the parties. And that latter point is well described in Professor Zimmerman's Commentary on the Court's Statute, where it is said that

> "The most fundamental principle of substantive law applicable to judicial proceedings in general is the proposition that, by engaging in proceedings before an international tribunal, the parties enter into a legal relationship characterized by mutual trust and confidence. Thus, the parties are bound by a general commitment of loyalty among themselves and towards the Court. This duty flows from the principle of good faith recognized in general international law and stipulated also in Article 2, paragraph 2, of the United Nations Charter as a general duty of the Member States. The principle of good faith has a series of 'concretizations' in the field of procedural law . . . First [says Professor Zimmerman], it requires the parties not to undertake any action which could frustrate or substantially adversely affect the proper functioning of the procedure chosen, the point being to protect the object and purpose of the proceedings."[52]

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[49]Bin Cheng, *General Principles of Law as applied by International Courts and Tribunals*, 121-136 (1953).

[50]Elizabeth Zoller, *La Bonne Foi en Droit International Public*, 24-42, 140-156 (1977).

[51]Michael Byers, *Abuse of Rights: An Old Principle, a New Age*, 47 McGill L.J. 389-431 (2002).

[52]Zimmerman, *supra,* 830.

21. To put the point bluntly, litigation is not a game. Parties are not free to turn the words of the Court's Statute or Rules to serve purposes that they were never intended to serve. There is no compulsory jurisdiction in international law. If States are to become bound to settle their disputes before international tribunals, they must choose to do so; and their choice must be declared; and the tribunal's jurisdiction is circumscribed by the terms of that declaration.

22. There is no room for the suggestion that having "signed up" to the jurisdiction of a tribunal over a particular dispute — whether this Court or any other tribunal — a State must be taken to have agreed to give the tribunal the right to play any role, and make any order whatsoever in relation to that dispute.

23. Madam President, there are two aspects to the acceptance of international jurisdiction by a State. There is the acceptance that a particular dispute or disputes in a particular category can go to a specific tribunal. But, equally important, there is also the acceptance that the powers of that tribunal are no more and no less than those that are created by the instruments which define its powers and those that are inherent in its role as a judicial tribunal. No tribunal has unfettered powers. States do not — and I make this submission with proper respect, knowing that it touches the core of the Court's discretion and responsibilities but confident that the Court will hear it as a respectful reminder of the limits of a court's power — States do not give tribunals whose jurisdiction they accept a carte blanche to make any and every contribution to the handling of the dispute that the tribunal might be urged to make. There comes a point where any international tribunal must say "we cannot do what we are requested to do. It lies outside our powers. We are neither obliged, nor entitled, to allow the tribunal to be used in this way."

24. Well, the question of what amounts to an abuse of process is a large one, which cannot possibly be comprehensively addressed in these proceedings, and we confine ourselves to the submission that within the indisputable core of that concept is the principle that tribunals, and procedural devices within judicial processes, may not be used for purposes that are alien to those for which they were established. I shall return to this point shortly; but for now it is enough to say that this is a particular application of the broader application of *détournement de pouvoir*, or misuse of powers. Such abuses damage not only the integrity and reputation of the tribunal which is the

target of the attempt to enlist it in inappropriate activities, but also the rights of the other party, which suffers as a result of the abuse of right.

25. We submit that the Court has now reached the point where it must say, "we cannot allow the tribunal to be used in this way".

Proposition 3: The Court is not bound by a party's characterization of its application

26. I turn now and briefly to proposition 3, that the Court is not bound by a party's characterization of its application. My colleagues Mr. Matthias and Mr. Thessin have already addressed this point. And they explained, first, that there is no dispute, and second, that it is well established in the Court's jurisprudence in *Peace Treaties*, *South West Africa* and other cases that the assertion of one by the parties that there is a dispute cannot bind the Court. The existence of the dispute is an objective question, to be determined by the Court.

27. It may be helpful to draw the Court's attention to the kind of question that might be put to Mexico in order to elicit some sort of an answer to this point. Article 59 of the Rules of Procedure of the Inter-American Court on Human Rights sets out the rules governing applications for the interpretation of judgments of that court, and it stipulates that:

> "The request for interpretation, referred to in Article 67 of the Convention [that is the 1969 American Convention on Human Rights], may be made in connection with judgments on the merits or reparations and shall be filed with the Secretariat. *It shall state with precision the issues relating to the meaning or scope of the judgment of which the interpretation is requested*." (http://www.corteidh.or.cr/reglamento.cfm) (Emphasis added.)

It is that kind of provision that is helpful in determining whether there really is a dispute, and if so, what it is. It is, of course, very similar to the terms of Article 98 of the Rules of this Court. Mexico refers to "differences" between obligations of result and obligations of means. But the United States accepts that it is under an obligation of result. Mexico's counsel *themselves* drew your attention to this. Ms Babcock told you that every member of the United States Supreme Court acknowledged that the United States was under an international law obligation to comply with the *Avena* Judgment (Mexican pleadings, p. 16). Ms Amirfar referred to the recognition by the Supreme Court of "the existence of the undisputed, unequivocal obligation to comply with *Avena*" (Mexican pleadings, p. 25) — perhaps a slip, but a telling one. She said that Mexico was here to

"seek confirmation" of the *Avena* Judgment. Exactly so. You have said it once and Mexico now wishes you to say it again.

One might ask Mexico, what precisely are the issues relating to the meaning or scope of the Judgment of which the interpretation is requested? What precisely is the dispute between Mexico and the United States?

28. And unless Mexico gives clear answers to such questions, its Application cannot even get off the ground. But even if it does offer answers to those questions, it is for the Court to decide whether or not there is a real dispute between the Parties. The fact that Mexico's Application is based on the premise that there is a dispute does not make that premise correct. And that is the point that my colleagues have made.

29. I shall now turn swiftly to my next point.

Proposition 4: Where a party asserts that it is making an application to the Court for an order for a specific purpose and the Court considers that the party is in reality pursuing some different purpose which takes the application outside the scope of the provision on which it is purportedly based, the Court is entitled to dismiss the application

30. My fourth proposition is that where a party asserts that it is making an application to the Court for a judgment or order for a specific purpose and the Court considers that the party is in truth pursuing some different purpose which takes the application outside the scope of the provision on which it is purportedly based, the Court is entitled to reject the application on that ground.

31. More than half a century ago this Court clearly defined its role in interpretation proceedings. As Mr. Mathias recalled, in the Judgment concerning the interpretation of the *Asylum* case it said:

> "The real purpose of the request must be to obtain an interpretation of the judgment. This signifies that its object must be solely to obtain clarification of the meaning and the scope of what the Court has decided with binding force, and not to obtain an answer to questions not so decided. Any other construction of Article 60 of

> the Statute would nullify the provision of the article that the judgment is final and without appeal." (Request for Interpretation of the Judgment of 20 November 1950 in the Asylum Case (Colombia v. Peru), Judgment, I.C.J. Reports 1950, p. 402.)[53]

The Court has consistently based itself on that principle. The passage that I have just read out was, for example, quoted by this Court in the *Nigeria* v. *Cameroon* interpretation case in 1999 (*Request for Interpretation of the Judgment of 11 June 1998 in the Case concerning the* Land and Maritime Boundary between Cameroon and Nigeria (Cameroon *v.* Nigeria), Preliminary Objections *(Nigeria* v. *Cameroon), Judgment, I.C.J. Reports 1999 (I)*, pp. 36-37, para. 12).

32. The principle is important. Here Mexico is, no doubt, seeking to use the *Request for interpretation* in order to advance the aim of the full implementation of the earlier Judgment. But the sword that Mexico is wielding has two edges, and it could equally well be used to delay implementation. As the Court itself said, again in *Nigeria* v. *Cameroon*:

> "The question of the admissibility of requests for interpretation of the Court's judgments needs particular attention because of the need to avoid impairing the finality, and delaying the implementation, of these judgments. It is not without reason that Article 60 of the Statute lays down, in the first place, that judgments are 'final and without appeal'." *(Id.)*[54]

33. The central issue here is how the Court will regard its power to interpret its own judgments and in considering that question the Court will have to consider again the question of the implications of acceding to requests for interpretations which has led it in the past to base itself upon a carefully balanced understanding of the role of interpretative judgments within the international judicial process.

34. The Court recently acted upon precisely this basis, in its Judgment of 3 February 2006 in the case of *Armed Activities on the Territory of the Congo*. And as the Court will recall, in paragraph 107 of that Judgment, the Court said this:

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[53]French text:

> "Il faut que la demande ait réellement pour objet une interprétation de l'arrêt, ce qui signifie qu'elle doit viser uniquement à faire éclaircir le sens et la portée de ce qui a été décidé avec force obligatoire par l'arrêt, et non à obtenir la solution de points qui n'ont pas été ainsi décidés. Toute autre façon d'interpréter l'article 60 du Statut aurait pour conséquence d'annulera disposition de ce même article selon laquelle l'arrêt est définitif et sans recours."

[54]French text:

> "La question de la recevabilité des demandes en interprétation des arrêts de la Cour appelle une attention particulière en raison de la nécessité de ne pas porter atteinte au caractère définitif de ces arrêts et de ne pas en retarder l'exécution. Ce n'est pas sans raison que l'article 60 du Statut énonce en premier lieu que les arrêts sont 'définitive[s] et sans recours'."

> "Article XIV, paragraph 2, of the Unesco Constitution provides for the referral, under the conditions established therein, of questions or disputes concerning the Constitution, but only in respect of its interpretation. The Court considers that such is not the object of the DRC's [of the Congo's] Application. It finds that the DRC has in this case invoked the Unesco Constitution and Article I thereof for the sole purpose of maintaining that '[o]wing to the war', it 'today is unable to fulfil its missions within Unesco'. The Court is of the opinion that this is not a question or dispute concerning the interpretation of the Unesco Constitution. Thus the DRC's Application does not fall within the scope of Article XIV of the Constitution."[55]

Accordingly, the Court rejected the application which the DRC had made on the basis of the Unesco Constitution.

35. The passage that I have quoted makes clear two points, beyond any need for further interpretation or explanation.

36. The first is that the Court can and will exercise a power to determine, on the basis of the application and the evidence before the Court, what the purpose of the application is and whether that purpose falls within the ambit of the provision upon which the Applicant relies to establish the jurisdiction of the Court or outside the ambit of that provision. In the *Congo* case it was evident from the Application that the DRC's real point was that it was unable to fulfil its "missions within Unesco"[56] — the complaint was, in essence, that the implementation of the provisions of the Unesco Constitution was being impeded. The DRC asked the Court to exercise its jurisdiction on the basis of a provision in the Unesco Convention which gave the Court the power to interpret the Unesco Constitution[57]. The DRC presented its Application as a matter falling within the power to interpret the Unesco Constitution: but the Court took a different view.

37. The second point is that once the Court had decided that the DRC was not in reality seeking an interpretation of the Unesco Convention, it decided that the Court could not proceed on

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[55] French text:

> "paragraphe 2 de l'article XIV de l'acte constitutif de l'Unesco n'envisage la soumission de questions ou différends relatifs à cet instrument, aux conditions prévues par cette disposition, qu'en matière d'interprétation dudit instrument. La Cour considère que tel n'est pas l'objet de la requête de la RDC. En effet, elle constate qu'en l'espèce la RDC n'a invoqué l'acte constitutif de l'Unesco et son article premier qu'aux seules fins de soutenir que, du 'fait de la guerre', elle 'est aujourd'hui incapable de remplir ses missions au sein de l'Unesco'. De l'avis de la Cour, il ne s'agit pas là d'une question ou d'un différend relatif à l'interprétation de l'acte constitutif de l'Unesco. La requête de la RDC n'entre ainsi pas dans les prévisions de l'article XIV de cet instrument."

[56] "Par le fait de la guerre, la République Démocratique du Congo est aujourd'hui incapable de remplir ses missions au sein de l'Unesco notamment le droit à la liberté de pensée, de conscience et de religion, le droit de chercher, de recevoir et de répandre, sans considération de frontière, les informations et les idées par quelque moyen que ce soit." (Application, p. 25.)

[57] Art. XIV.2: "Any question or dispute concerning the interpretation of this Constitution shall be referred for determination to the International Court of Justice or to an arbitral tribunal, as the General Conference may determine under its Rules of Procedure."

the basis of a provision which gave the Court jurisdiction only over questions of interpretation. There was no suggestion that the Court might try to delve into the case and discover some dispute over interpretation upon which it might say something to the parties. The Application was simply misconceived; and it was dismissed.

38. Madam President, Members of the Court, the closeness of the parallels with the present case is inescapable. Mexico's real point is that the *Avena* Judgment is not being implemented. It is asking the Court to deal with its Application on the basis of the Court's competence to interpret the *Avena* Judgment. But there is no real dispute over the interpretation of that Judgment. The United States submits that, just as the Court dismissed the DRC Application, it should dismiss the Mexican Application in this case.

Proposition 5: Specifically, where it appears to the Court that a party is making an application for a judgment or an order solely for the purpose of bringing pressure upon the other party to comply with an earlier judgment or order of the Court, the Court is entitled to reject the application on the ground that it amounts to an abuse of process

39. I turn to my fifth proposition, which is that where it appears to the Court that a party is making an application for a judgment or order *solely* for the purpose of bringing pressure upon the other party to comply with an earlier judgment or order of the Court, the Court is entitled to reject the application on the grounds that it amounts to an abuse of process.

40. Mexico has attempted to manufacture a dispute in order to provide a basis for a provisional measures application whose sole aim — as is explicit in the Application itself — is to induce the Court to reiterate the obligation on the United States to comply with the clear and unequivocal terms of the *Avena* Judgment. That is misconceived, as was the Democratic Republic of the Congo claim to which I have just referred. But there is a further aspect to the Mexican Application which should not be ignored.

41. Common sense — which is always a good friend of the lawyer — makes it clear that the purpose of Mexico's Application is to bring pressure on the United States to comply with its obligations under the *Avena* Judgment. I should perhaps say, to comply with what the United States has explicitly and repeatedly admitted are its obligations under the *Avena* Judgment. The Application is not concerned with interpretation, but with enforcement. It is trying to draw the Court into the role of monitor and enforcer of its own judgments: and that, in our submission, is

itself a clear abuse of process, because, to use again the words of the Zimmerman Commentary on the Court's Statute, it is a "use of procedural instruments or rights by one or more parties for purposes that are alien to those for which the procedural rights were established".

42. The enforcement of this Court's judgment is provided for, not in the Court Statute but in Article 94 of the United Nations Charter. Article 94, paragraph 2, provides that:

> "If any party to a dispute fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment."[58]

In the constitutional order of the United Nations, of which this Court is the principal judicial organ, it is the Security Council, and not the Court, which has responsibility for the enforcement of the Court's judgments. As the late Professor Mosler put it in Judge Simma's Commentary on the United Nations Charter, "[t]he enforcement of decisions is not a matter for the ICJ"[59]. It is as simple as that.

43. The rationale for this position is explained by Ambassador Rosenne in his study of the Court. He wrote that:

> "in international law the separation of the adjudication from the post-adjudication phase is a fundamental postulate of the whole theory of the judicial settlement of disputes, and . . . this leads to the consequence that if the post-adjudication phase gives rise to new political tensions, that situation or dispute will not be identical with the case terminated by the judgment in question. Therefore the relevant provisions are found in the Charter (as in the League Covenant before it), and not in the Statute of the Court. Those stipulations relate exclusively to the powers of the Security Council (and indirectly to those of other organs of the United Nations, and in particular the Secretary-General as head of the Secretariat) but not to the functioning of the Court."[60]

44. We respectfully submit that the Court should continue to observe that fundamental separation between the adjudication and the post-adjudication enforcement phase, and should not permit itself to be drawn into the monitoring and enforcement of its own decisions. Certainly, to attempt to pull the Court into these post-adjudication functions on the back of the Court's

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[58]French text: "Si une partie à un litige ne satisfait pas aux obligations qui lui incombent en vertu d'un arrêt rendu par la Cour, l'autre partie peut recourir au Conseil de sécurité et celui-ci, s'il le juge nécessaire, peut faire des recommandations ou décider des mesures à prendre pour faire exécuter l'arrêt."

[59]The Charter of the United Nations, 1175 (Bruno Simma ed., 2002).

[60]Shabtai Rosenne, *The Law and Practice of the International Court of Justice 1920-2005*, pp. 239-240 (2006).

jurisdiction to interpret its judgment is as plain an example of an abuse of process as one could wish to find.

Proposition 6: The Court may dismiss an application in the circumstances I have described at any stage in the proceedings, because the dismissal is an exercise of the Court's inherent power to regulate its own proceedings in the interests of justice and in order to safeguard the integrity of the Court

45. I turn to my final proposition, that the Court may dismiss an application in the circumstances I have described at any stage in the proceedings, because the dismissal is an exercise of the Court's inherent power to regulate its own proceedings in the interests of justice and in order to safeguard the integrity of the Court.

46. This hearing is on a request for provisional measures, and it might be said that all of the points that I have made so far are points that can be discussed at leisure in a hearing on the substance of the Application for interpretation. But that would, we submit, be a wholly misconceived conclusion and one which could only be reached if all of our submissions — mine and those of my colleagues — are rejected by the Court.

47. The Court can only receive an application under Article 60 of its Statute if there is a dispute. That is what Article 60 says. If, as we submit, there is no dispute, the Court cannot be seised of a valid request for interpretation, and there is no case before the Court to which this provisional measures Application can be incidental.

48. If the alleged dispute has been manufactured by Mexico, as we submit, and there is no real dispute, the Court should dismiss the Application as an abuse of process.

49. And I should perhaps say here that even to speak of a claim "manufactured" by Mexico is to overstate the case. Mexico could, perhaps, have tried to find, through diplomatic exchanges, some point of interpretation, no matter how minor, on which the Parties disagreed. But it did not. This is a dispute with only one party — Mexico — which is trying to persuade the Court that the United States really is embroiled in an argument. But it is not. There is no dispute.

50. If there is no dispute, and Mexico is simply trying to use the Court to put pressure on the United States to comply with the *Avena* Judgment, that is an abuse of process, and the Court should dismiss the Application.

51. If Mexico is trying to draw the Court into the role of monitor and enforcer of its own judgments, that too is an abuse of process.

52. My point is that all of these propositions have in common one thing, the fact that they are as true today as they would be in six, 12, 18 months' time when any hearing on the substance of Mexico's claim might be held. There is no rational reason for the Court to delay a decision on these submissions. An abuse of process is an abuse of process, from its inception until the moment when the tribunal asserts its authority and imposes order: and if this Application is, as we submit, misconceived, it should be dismissed forthwith, together with the request for the indication of provisional measures which is the immediate focus of our attention.

53. Madam President, Members of the Court, I thank you for your attention and I would ask you now to call upon the Agent of the United States to make our closing submissions in this round.

The PRESIDENT: Thank you, Mr. Lowe, and I now call upon the Agent of the United States.

Mr. BELLINGER:

Conclusion

1. Thank you again, Madam President, Members of the Court. I have only a few very short comments at this point to conclude the presentation of the United States today.

2. *First*, as my colleagues have explained, it simply would not be appropriate for the Court to indicate provisional measures in this case. There is no dispute between Mexico and the United States "as to the meaning or scope" of the *Avena* Judgment. Article 60 requires such a dispute, and without one, there is no basis for the Court to proceed with Mexico's Application. Under these circumstances, the Court lacks the prima facie jurisdiction required for the indication of provisional measures, and the Court should therefore dismiss Mexico's request.

3. *Second*, the United States understands the gravity of the issue here — we are not blind to it. A man is scheduled to be executed. The issue of capital punishment arouses deep feelings. But this case is not about the death penalty. Although a pending execution date lends to the case an obvious immediacy, it is not at the heart of the legal issue before you. Rather, what *is* at the heart

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CR 2016/4

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2016

Public sitting

held on Thursday 10 March 2016, at 10 a.m., at the Peace Palace,

President Abraham presiding,

***in the case regarding* Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands *v.* India)**

Jurisdiction

VERBATIM RECORD

ANNÉE 2016

Audience publique

tenue le jeudi 10 mars 2016, à 10 heures, au Palais de la Paix,

sous la présidence de M. Abraham, président,

***en l'affaire des* Obligations relatives à des négociations concernant la cessation de la course aux armes nucléaires et le désarmement nucléaire (Iles Marshall c. Inde)**

Compétence

COMPTE RENDU

raised a dispute with each and every one of the States possessing nuclear weapons, including India, actually underlines the absence of a dispute. India was present at that Conference unlike the NPT nuclear-weapon States and stated on record its support for nuclear disarmament and its commitment to the complete elimination of nuclear weapons in a time-bound, universal, non-discriminatory, phased and verifiable manner. We agreed with the RMI in substance if not in semantics on the need to move towards "an effective and secure disarmament". The question of a dispute does not arise.

12. Finally, Mr. President, global nuclear disarmament by its very nature cannot be litigated between two States or among a handful of States; it is a goal that has to be supported by all States; it has to be negotiated in the presence of and with the active participation of all the relevant States, in particular States whose interests are specially affected. As I have shown in the first part of my presentation, this essential fact is recognized in the United Nations Charter and is implicit in the disarmament machinery established by consensus by the international community. This essentiality is also recognized in India's position that the first step toward a nuclear-weapons-free world is a universal commitment and an agreed global and non-discriminatory multilateral framework. We remain ready to work for this noble goal in the designated multilateral forums.

13. Mr. President, I thank you for your patience. May I request you now to invite Mr. Harish Salve to make his presentation?

Le PRESIDENT : Merci. Je donne à présent la parole à M. Salve.

Mr. SALVE: Honourable President, esteemed Members of the Court, I am indeed honoured to appear in this Court for the first time and I am privileged to represent my country, India, in these proceedings.

PART I
OPENING REMARKS

1. Mr. President, India is the only State possessing nuclear weapons that has co-sponsored and that votes for the United Nations General Assembly resolution on the "Follow-up to the advisory opinion of . . . [this Court] on the legality of the threat or use of nuclear weapons."[15]

[15]Counter-Memorial of India (CMI), Ann. 8.

2. The Co-Agent has just quoted the resolution that "calls upon all States to immediately commence multilateral negotiations leading to an early conclusion of a nuclear weapons convention prohibiting the development, production, testing, . . . of nuclear weapons".

3. India has consistently voted for and sponsored the resolution aforesaid, the Marshall Islands either voted against or abstained on nine occasions, and it voted in favour of the resolution only once.

4. And yet, surprisingly, I am standing here, Sir, to defend India in an application that not only alleges that India has participated vigorously in the nuclear arms race but that India is remiss in its obligations to negotiate in good faith and conclude treaties for nuclear disarmament.

5. As I will endeavour to show, Sir, India and the Marshall Islands are fully aligned on the need for elimination of nuclear weapons. There was no occasion for the Marshall Islands to initiate these proceedings against India. But yet it has chosen to do so. This is why, Professor Pellet and I will endeavour to show that the dispute is artificial and there is really no reason or basis to invoke the jurisdiction of the Court.

6. I will in my first part, address the Court on the following issues:

(i) First, that the proceedings and their conduct is an abuse of process.

(ii) Secondly, that there is no real dispute between India and the Marshall Islands, and

(iii) Thirdly, that there was no prior notification of the dispute by the Marshall Islands.

My address on the second issue, about the absence of a real dispute, will be limited to only two facets. I am sharing the advocacy with Professor Pellet on this issue.

7. Professor Pellet will then address you on three issues:

(i) The absence of dispute between the Parties.

(ii) The absence of indispensable parties — that is, the *Monetary Gold* principle.

(iii) The absence of any practical consequences of any judgment on the merits.

8. I will then again, Sir, take the floor to address you on the four reservations on account of which, India claims, that this Court lacks jurisdiction. My opening address should take less than 50 minutes. Professor Pellet will take less than 40 minutes and my closing address shall be not more than 35 minutes.

I. ABUSE OF PROCESS

A. Vacillation in the Marshall Islands' formulation of the dispute

9. The course of the proceedings, Mr. President, leaves no manner of doubt that the entire venture has been an abuse of process. The proceedings were initiated by an application that raised various disputes, and sought remedies and relief far beyond those that would flow if this Court were to accept that paragraph 2 (F) of the *dispositif* in the Advisory Opinion of the Court[16] reflected a principle of customary international law. The Application, Mr. President, was based on a far broader principle of customary international law.

10. The Memorial failed to set out facts and law in support of the broad allegations in the Application that India's actions, by way of what was described as a quantitative build up and a qualitative improvement of its nuclear arsenal, violated customary international law. On the contrary, the Memorial stated that the only dispute that arises relates to India's alleged inaction in the matter of negotiating treaties for disarmament.

11. In the course of submissions, some of the counsel appearing for the Marshall Islands have supported the thesis of the Memorial as to the limited remit of the dispute. Other counsel have placed reliance on the allegations that relate to India's alleged actions in relation to its nuclear weapons programme, and have categorically asserted that they continue to seek the declarations and the order sought in the Application.

12. Although on reading the Memorial it appeared that the Marshall Islands had scaled down its case, it is now apparent that this is a carefully crafted duplicity, which I call an abuse of the process. It is clear that the Marshall Islands has no real dispute with India, but it seeks to sustain its position on the jurisdiction of the Court by resorting to contradictory positions.

13. The key disputes raised in the Application — and on which reliance has now been placed in oral submissions — were unambiguously abandoned in the Memorial. These disputes can be categorized — for the sake of clarity — into firstly those:

(i) Arising out of allegations relating to actions by India, such as its alleged quantitative increase and qualitative improvement of nuclear weapons, and its vertical proliferation, etc. — which allegations I shall refer to as India's nuclear weapons programme.

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[16] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I),* para.105.

(ii) Secondly, there were allegations of inaction — failure to stop further alleged advancement of the alleged nuclear weapons programme and to take steps to unilaterally disarm itself, which I shall refer to as unilateral disarmament, and

(iii) Thirdly, the failure to negotiate, in good faith, and bring to a conclusion, multilateral treaties for nuclear disarmament, which I shall refer to as negotiating disarmament.

14. The Memorial abandons the allegations that stem from the alleged nuclear weapons programme and the failure to resort to unilateral disarmament, and confines itself to those relating to the alleged lapses in negotiating disarmament.

15. Paragraph 47 of the Memorial states:

> "*Ex abundanti cautela*, it can be added that, more broadly, this dispute does not concern the question of India's right to possess a nuclear arsenal or to use nuclear weapons in self-defence. The present dispute, as defined in the Marshall Islands' Application, is about whether India has complied and is complying with its obligation to pursue in good faith, and bring to a conclusion, negotiations leading to nuclear disarmament in all its aspects under strict and effective international control."

16. This assertion is made in the context of the Marshall Islands' reply to India's challenge to jurisdiction based on reservation 4. The Memorial fails to state the basis on which the declarations and the order sought in the Application could be sustained on this formulation of the dispute between the Parties.

17. Counsel defending the challenge to jurisdiction on the basis of some of the reservations relied on the allegations relating to the alleged nuclear weapons programme, and counsel refuting India's submission that no purpose would be served by entertaining the Application, made it clear that the Marshall Islands continues to press for all the remedies by way of declarations and the order sought in the Application.

18. Mr. President, Members of the Court, an analysis of the Application and the Memorial will expose this duplicity.

B. Rules of the Court establish a clear procedure

19. Article 38 (1) requires proceedings to be instituted before this Court "by means of an application addressed as specified in Article 40, paragraph 1, of the Statute".

20. Article 40, paragraph 1, of the Statute requires cases to be brought before the Court by a written application addressed to the Registrar and requires that "the subject of the dispute and the parties . . . be indicated".

21. Subparagraph (2) of Article 38 sets out three distinct elements which must be found in an application presented to the Court and sets three different standards for each of them.

22. The three elements are:

(i) A statement as far as possible of the legal grounds on which the jurisdiction of the Court is to be based.

(ii) A statement of "the *precise nature* of the claim".

(iii) A "succinct statement of the facts and grounds on which the claim is based".

23. These Rules set out the rubric of the pleadings with differing emphasis. The application needs to specify the *precise nature* of the claim — the use of the word *precise*, I submit, is significant. The legal grounds need not exhaustively be set out in the first instance, for they are to be set out *as far as possible*. The narration of the facts and the grounds on which the claim is based — at the stage of the application — needs to be *succinct*.

24. There is a duality in the hearing procedure followed by the Court — the written and the oral. The Memorials and Counter-Memorials are part of the written procedure. Under Article 45, the Memorials and the Counter-Memorials are considered as a part of the pleadings "in a case begun by means of an *application*".

25. Article 49 of the Rules requires a Memorial to contain a statement of the relevant facts, a statement of law and the submissions. Unsurprisingly, a Memorial need not restate the claim as it is to set out the facts and the law *in extenso* in support of the claim already made in the Application. Mr. President, Members of the Court, in my submission, the Memorial supports and supplements the claim — it cannot be allowed to supplant the claim.

26. The Rules have been described by this Court, in *Republic of Guinea* v. *Democratic Republic of the Congo* as being "essential from the point of view of legal security and the good administration of justice"[17].

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[17] *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010 (II)*, p. 656, para. 38, recounting the observation in *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992,* p. 267, para. 69.

27. The Rules are, in the ultimate analysis, procedural and must serve the cause of justice, but at the same time the Rules designed to govern adversarial proceedings, and which rules have stood the test of time, cannot be bypassed with disdain. Where the consequence of laxity is an attempt to create confusion as to the subject-matter of the dispute itself, so as to be able to raise contradictory arguments so as to somehow sustain jurisdiction, this breach assumes serious overtones, and the course of the present proceedings demonstrates the hazards of taking such serious liberties with the established procedure.

28. The Application proceeds on the premise that customary international law *mandates* a cessation of the nuclear race, and mandates disarmament — and negotiations of treaties flow from these basic obligations. The Application, read holistically, appears to argue that the need to enter into good faith negotiations and to conclude treaties is a route to eliminate nuclear weapons and achieve disarmament, and thus is a vital step to comply with the customary obligation of cessation of the nuclear race and nuclear disarmament. It goes on to suggest that the obligation of unilateral disarmament also flows from customary international law. Reliefs sought flow from this fundamental formulation of obligations *erga omnes* to cease the production of nuclear weapons and thereby cease the nuclear arms race.

29. This approach of the Application is unabashedly abandoned in the Memorial — the obligation to negotiate that is asserted in the Application as a facet of the obligations under customary international law, is now made out to be *the* obligation and the Memorial argues that the dispute, and the ***only*** dispute relates to alleged lapses in negotiating disarmament.

30. The Memorial, Mr. President, Members of the Court, fails to tell us how the Marshall Islands would sustain the remedies sought in the Application if the dispute is only as formulated in the Memorial.

C. Analysis of the Application

31. In paragraph 2, the Application, while asserting that it is not an attempt to reopen the question of the legality of nuclear weapons, states that "the focus of this Application is the failure to fulfil the obligations of customary international law with respect to cessation of the nuclear arms

race at an early date and nuclear disarmament *enshrined in* Article VI of the NPT and declared by the Court".

32. Paragraph 6 of the Application refers to "underlying claims" as those arising from India being in continuing breach of its obligations under customary international law, *including specifically* its obligation to pursue in good faith negotiations to cease the nuclear arms race at an early date, as well as to pursue in good faith negotiations leading to nuclear disarmament in all its aspects under strict and effective international control; and in continuing to breach its obligation to perform its international legal obligations in good faith. The latter set of allegations of breach of the obligation to perform its international obligations in good faith, are explained in the last section of the Application. These allegations, Mr. President, relate to actions in the matter of India's alleged nuclear weapons programme, and they are not limited to its alleged inaction in the matter of negotiating disarmament.

33. Paragraph 13 of the Application alleges that India is taking actions to improve and expand its nuclear forces and to maintain them for an indefinite future.

34. Paragraph 14 alleges a breach of obligation under customary international law to pursue in good faith negotiations leading to nuclear disarmament, in particular by its actions by way of a quantitative build-up and qualitative improvement of its nuclear force.

35. *Paragraph 58 argues that a quantitative build-up and a qualitative improvement of nuclear forces is contrary to the objective of nuclear disarmament and is a breach of the obligation of customary international law.*

36. Paragraph 59 merits a quotation verbatim. It states:

> "The customary international law obligation of cessation of the nuclear arms race at an early date is rooted in Article VI of the NPT and resolutions of the General Assembly and the Security Council and is inherent in *the obligation of nuclear disarmament enunciated by the Court*. The Respondent is failing to comply with this obligation; on the contrary, it is engaged in all-out nuclear arms racing."

The allegation suggests that until such time as a treaty is arrived at, States are under an obligation *erga omnes* to pause their nuclear weapons programme, and a failure to do so violates customary international law. Untrue as these allegations are, they are qualitatively different from the assertion in the Memorial that the international law obligations are to engage in good faith negotiations and to conclude disarmament treaties — no less, but no more.

37. Paragraph 60 continues in the same vein and alleges — we say falsely — that India's conduct in quantitatively building up its nuclear forces and qualitatively improving and diversifying them, and planning and preparing to maintain them for an indefinite future is — in the Marshall Islands' words — "clear *evidence of India's ongoing breach* of the obligation regarding . . . cessation of the nuclear arms race at an early date".

38. Part B, commencing with paragraph 61, alleges breaches by India to perform its obligations in good faith. Paragraph 62 repeats what we say are false allegations relating to India's alleged engagement in quantitative build-up, diversification and qualitative improvement of its nuclear arsenal and states that — in the Marshall Islands' words — a "vertical nuclear proliferation that clearly conflicts with the Respondent's obligations of nuclear disarmament and cessation of the nuclear arms race at an early date". Paragraph 64 concludes by alleging, again in Marshall Islands' words, that "by engaging in conduct that directly conflicts with the obligations of nuclear disarmament and cessation of the nuclear arms race at an early date, the Respondent has breached and continues to breach its legal duty to perform its obligations under customary international law in good faith".

39. Two of the declarations sought by the Marshall Islands are based on what we say are false allegations. In substance they are:

(i) that India has violated and continues to violate its international obligations . . . by taking actions to quantitatively build up its nuclear forces, to qualitatively improve them, and to maintain them for the indefinite future . . . by taking actions to quantitatively build up its . . . forces, to qualitatively improve them, and . . . maintain them ***indefinitely*** for the . . . future;

(ii) that India has failed and continues to fail to perform in good faith its obligations under customary international law by taking actions to quantitatively build up its forces and to qualitatively improve them, and to maintain them for the future;

40. The Order that the Marshall Islands seeks — after these declarations — in the Marshall Islands' words is, "India to take all steps necessary to comply with its obligations under customary international law with respect to cessation of the nuclear arms race at an early date *and nuclear disarmament within one year of the Judgment*, *including* the pursuit, by initiation *if*

necessary, of negotiations in good faith aimed at the conclusion of a convention on nuclear disarmament in all its aspects under strict and effective international control".

41. The Memorial fails to support this case — on the contrary it argues against such a case by formulating principles of customary international law in a manner that completely undermines the Application to which I have just alluded.

42. The subject-matter of the dispute is a disagreement between the States on a point of law or fact. Whether there is a dispute, and if so, what the dispute is, is a matter for objective determination by the Court. In the *South West Africa* cases, this Court held that it has to assess whether the "claim of one party is positively opposed by the other"[18]. It is the claim and not the legal submissions in support of the claim which would delineate the contours of the dispute.

43. In *Fisheries Jurisdiction (Spain* v. *Canada)*, this Court referred to Article 40 (1) of the Statute and Article 38 (2) of the Rules — provisions which have been characterized as essential from the point of view of legal security and the good administration of justice — and came to the conclusion that there may be uncertainties with regard to the real subject-matter of the dispute, and the Court must for its objective evaluation give "*particular attention* to the formulation of the dispute chosen by the Applicant"[19].

44. Reading the Application as a whole, it cannot be gainsaid that the assertion in paragraph 2 of the Application, that it does not seek to reopen the issue of legality of nuclear weapons, is plainly untrue and is belied by the allegations in the paragraphs that follow. India submits that the characterization of India's actions in relation to its alleged nuclear weapons programme is founded on false assertions. But for the present hearing, it becomes necessary to examine the Application for what it says as, at this stage, the veracity of the factual allegations on controversial issues cannot be investigated. A reading of the Application would leave no manner of doubt that the dispute is not about the failure to negotiate treaties — the alleged shortcomings in compliance with the alleged obligation to negotiate disarmament treaties, but that is a facet of the alleged breach of the asserted principles of customary international law.

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[18] *South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 328.

[19] *Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 448, para. 30; emphasis added.

D. Memorial concedes the main dispute

45. The Memorial filed by the Marshall Islands concedes the principal dispute raised in the Application and it seeks to preserve the alleged failure to negotiate disarmament treaties in good faith as the *only* dispute.

46. When called upon by the Rules to state the law in support of the Application, the Memorial unsurprisingly draws back from the assertions of the principles of customary international law in the Application, and the interpretation placed upon the Advisory Opinion of this Court (*Legality of the Threat or Use of Nuclear Weapons*) found in the Application. Instead, it formulates the principle of customary international law as being limited to pursuing negotiations of disarmament in good faith and concluding treaties. The dispute is now limited to the alleged failure to negotiate and conclude disarmament treaties.

47. The reason for this is not far to seek. The Memorial fastens upon paragraph 2 (F) of the *dispositif* of the Advisory Opinion — and this appears to be the sheet anchor of the case of the Marshall Islands even in the oral submissions.

48. The Memorial attempts to shield this tectonic change in Marshall Islands' case under the argument that, for the present, it is not articulating the case on merits but is only dealing with jurisdictional issues. Nonetheless, called upon to formulate the dispute on account of India's challenges that there is no real dispute, the Memorial seeks to formulate the dispute, and the propositions of customary international law on which it bases this dispute abandon the case run in the Application.

49. There are some significant features of the Memorial that are worthy of mention.

(i) In contradistinction to paragraph 2 of the Application, paragraphs 2, 3, 6 of the Memorial describe the subject-matter of the Application as being based upon the obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament — no less but no more.

(ii) Paragraphs 13 and 15 of the Memorial suggest that the dispute between the Marshall Islands and India concerns India's alleged non-compliance with the obligation to pursue and bring to a conclusion negotiations leading to disarmament.

(iii) Having given up matters arising out of the allegations in relation to the alleged nuclear weapons programme and failure in the matter of unilateral disarmament, paragraph 19 of the Memorial is disingenuous; it refers to India's conduct as evidence of opposition to the Marshall Islands' claims only to support Marshall Islands' submission that a dispute has indeed arisen between the Marshall Islands and India.

(iv) In an abandonment of the assertions in paragraphs 59 to 62 of the Application that alleged a breach of customary international obligation in relation to India's alleged nuclear weapons programme and its failure to unilaterally disarm itself, the Memorial in paragraph 47 asserts that the dispute does not concern the question of India's right to possess a nuclear arsenal or to use nuclear weapons in self-defence. I have quoted it a moment ago. It said that "this dispute does not concern . . . India's right to possess a nuclear arsenal or to use nuclear weapons in self-defence".

50. A Memorial must, Mr. President, Members of the Court, justify invocation of the jurisdiction of the Court for the issues raised in the Application — it should not advance a disingenuous basis to distance itself from the Application to get past some of the jurisdictional challenges, keeping the disputes raised in the Application available at hand to meet other jurisdictional challenges, and if the jurisdiction is upheld, then to be able to run the case based upon the allegations in its Application. That the intention of Marshall Islands was to do this has become apparent from the oral submissions made and which I shall deal with shortly.

51. The issue of nuclear proliferation and nuclear disarmament raise questions of great sensitivity not only between nuclear weapon States but also equally affecting non-nuclear weapon States. The Advisory Opinion did not declare the possession of nuclear weapons a violation of international law. The Application does not suggest that after the Advisory Opinion of the Court, the principles of customary international law have been radically altered by the conduct of States — on the contrary it laments the failure of the world over the decades to find a solution leading to nuclear disarmament. And yet, the claim made in the Application alleges precisely that — it says that the production of nuclear arms and the failure to take unilateral measures of disarmament violate customary international law. The Memorial abandons this position.

52. India submits that the manner in which the Marshall Islands has conducted this case is in brazen violation of the procedural rules, and the consequence is that there are two parallel cases before the Court:

(i) one based upon allegations of breach by India of its alleged obligations under customary international law by its pursuit of its alleged nuclear weapons programme, and by its failure to take steps to unilaterally disarm itself;

(ii) the second case based upon the alleged rule of customary international law limited to the obligation to negotiate in good faith and conclude disarmament treaties, and India's alleged failure to discharge this limited obligation.

53. Having run these parallel cases, the Marshall Islands draws alternately upon one or the other to sustain its contentions in defence to India's challenge to the jurisdiction.

E. Oral submissions draw upon one or the other cases being run by the Marshall Islands to defeat the challenges to jurisdiction

54. The Agent and the Co-Agent of the Marshall Islands asserted that:

(i) the production of arms can never be justified;

(ii) the case against India is based on its conduct in the quantitative build up and qualitative improvement of its nuclear arsenal.

55. In replying to India's contention in the Counter-Memorial that there was only a contrived dispute, the Marshall Islands relied upon paragraphs 2, 6, and 64 of its Application.

56. Paragraph 64 of the Application states:

> "In short, by engaging in conduct that directly conflicts with the obligations of nuclear disarmament and cessation of the nuclear arms race at an early date, the Respondent has breached and continues to breach its legal duty to perform its obligations under customary international law in good faith."

Paragraph 64 refers to India's actions in the matter of its alleged nuclear weapons programme — not to India's alleged omissions in the area of negotiating disarmament treaties. This position is further clarified by reference to earlier paragraphs. I submit, Sir, paragraph 64 has to be read with paragraphs 60, 62 and 63 which allege that actions of India in relation to its alleged nuclear weapons programme and the fact that its plans and policies manifest an intention to rely on its nuclear arsenal for decades to come.

57. In defending India's challenge to the jurisdiction of the Court on the principle of *ratione temporis*, counsel relied on India's conduct post-1974 by way of, what we call, the falsely alleged affirmative actions of quantitative build-up and qualitative improvement of its nuclear weapons arsenal — apart from India's failure to negotiate.

58. In dealing with India's challenge to the jurisdiction of the Court, for want of presence of the other States — the *Monetary Gold* principle — counsel relied on allegations of quantitative build-up and qualitative improvement as being part of the focus of the Marshall Islands' claims, and argued that for this purpose the Marshall Islands does not need to prove any other act against any other State.

59. Finally, while dealing with India's contention that no legitimate purpose would be served in entertaining this Application, in oral submissions counsel asserted that the reliefs Marshall Islands seeks are the declarations and the order as set out in the Application.

60. However, when dealing with India's challenge based upon reservation 4, and its right to secure its defence, counsel submitted that all that Marshall Islands seeks is to enforce the obligation to negotiate a disarmament treaty, and that such a relief did not tread upon reservation 4.

61. India submits that the Memorial filed in this Court must have some sanctity — it must state the facts and the law in support of an application so that the respondent is put to notice of the case it has to meet. The manner in which the proceedings have been conducted has thrown all order to the winds. If the Marshall Islands be confined to its bold assertion in paragraph 47 of the Memorial, then:

(i) firstly, in my submission, Sir, all submissions in defence to the challenge to jurisdiction based on the assertions in the Application and also the remedies sought in the Application, would stand excluded. I have just mentioned some of the submissions that drew on the Application and departed from the Memorial;

(ii) secondly, the jurisdictional challenge would then have to be decided solely on the basis of the Memorial.

62. It would not be possible for the Court to do this rather involved exercise of recasting submissions to exclude those based upon the Application but conceded in the Memorial — the Rules do not require the Court to do this for salvaging a case presented in this fashion.

F. Conclusion

63. This course of proceedings, Mr. President, Members of the Court, has resulted in the Court being seised of an application which asserts that India's alleged quantitative build-up and qualitative improvement of its nuclear armoury is violative of customary international law, and suggests that India is indulging in a nuclear arms race (while not pursuing the path of negotiations for disarmament) and that India's actions are therefore violative of customary international law.

64. The Application sets out a slew of declarations and seeks an order on this hypothesis.

65. The Memorial concedes the point and alleges that the only principle of customary international law that the Marshall Islands relies upon is that enshrined in Article VI of the NPT and in paragraph 2 (F) of the *dispositif* of the Advisory Opinion of this Court. India does not consider it appropriate to enter into a discussion of this issue at this stage of the hearing of a challenge to the jurisdiction, and invites the Court to consider these points raised by the Marshall Islands on a provisional basis at this stage, *de bene esse*.

66. On the basis of the principles of law set out in the Memorial, and in particular on account of what is said in paragraph 47 of the Marshall Islands' Memorial and which I have quoted earlier, this Application should be dismissed as it does not raise a real dispute between the Parties on the interpretation of the principle of customary international law — as the Memorial acknowledges, there is indeed no such principle of customary law as would be necessary to sustain the Application and the remedies sought in the Application.

II. NO REAL DISPUTE BETWEEN THE MARSHALL ISLANDS AND INDIA

67. I now move to my second point: that there is no real dispute between the Marshall Islands and India. Professor Pellet will develop this point fully, but I only want to make two short submissions on this vital issue. The first relates to the failure to articulate a dispute with clarity, and the second to show that the Marshall Islands and India are aligned on the question of the need for negotiating a treaty that would lead to global disarmament.

68. My first point relates to the amorphous formulation of the real dispute. Assuming that there is a principle of customary international law that obliges States to negotiate in good faith and conclude disarmament treaties, it would be necessary for the Application and the Memorial to

Corrigé
Corrected

CR 2016/8

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2016

Public sitting

held on Wednesday 16 March 2016, at 10 a.m., at the Peace Palace,

President Abraham presiding,

***in the case regarding* Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands *v.* India)**

Jurisdiction

VERBATIM RECORD

ANNÉE 2016

Audience publique

tenue le mercredi 16 mars 2016, à 10 heures, au Palais de la Paix,

sous la présidence de M. Abraham, président,

***en l'affaire des* Obligations relatives à des négociations concernant la cessation de la course aux armes nucléaires et le désarmement nucléaire (Iles Marshall c. Inde)**

Compétence

COMPTE RENDU

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20. I thank you for your patience. May I request you now to give the floor to Mr. Harish Salve?

Le PRESIDENT : Merci. Je donne maintenant la parole à M. Salve.

Mr. SALVE: Honourable President and Members of the Court, I am again grateful for this opportunity, Sir, for addressing this Court on behalf of my country. In keeping with the discipline of this Court, I shall limit my submissions today to dealing with the points that have been made in the oral submissions.

AN ARTIFICIAL CASE

1. The Marshall Islands' clarion call to the nuclear-weapon States was in February 2014 at Nayarit in Mexico. It said: "we urgently renew our call to all States possessing nuclear weapons to intensify efforts to address their responsibilities in moving towards an effective and secure disarmament". It lamented that "it has been more than 45 years since the conclusion of the treaty on non-proliferation of nuclear weapons" and that "multilateral negotiations on achieving and sustaining a world free of nuclear weapons are long overdue" and also that "immediate commencement and conclusion of such negotiations is required by legal obligation of nuclear disarmament resting upon each and every State . . .".

2. The Marshall Islands, who rightly reminded the world of the pain it suffered on account of testing of nuclear weapons, expressed its dismay that despite the nuclear non-proliferation treaty, negotiations to arrive at a multilateral convention for disarmament had not got off the ground.

3. And yet, Professor Chinkin argues that the Marshall Islands' position is that "a parallel rule of customary international law has developed through a *dynamic process*"[3]. Mr. President and Members of the Court, characterizing inaction of States as a dynamic process is symbolic of the artificial nature of this entire case.

4. Mr. van den Biesen began his submissions with a flourish. Citing newspaper reports that India had tested a ballistic missile with nuclear capability and a nuclear submarine, he raised the

[3]CR 2016/6, p. 31, para. 10.

pitch by suggesting that India was almost guilty of contempt of court. A contempt of court takes place when a party disrespects the court.

5. Mr. van den Biesen pursues the fiction that the dispute is based solely upon India's alleged failure to negotiate in good faith, a treaty for nuclear disarmament, but then he does not explain how such a purported dispute pending in a court and facing a jurisdictional challenge, gives rise to a suggestion of contempt of court.

6. India strongly refutes any suggestion that it is guilty of any indiscretion. India has always openly maintained that it would take measures to secure itself — making it clear that it steadfastly adheres to its policy of a credible minimum deterrent and no first use. India's actions are consistent with its stated position.

7. In my submissions earlier, I had characterized the conduct of the Marshall Islands as tainted by duplicity.

8. Mr. van den Biesen, while protesting my criticism of the Marshall Islands' conduct, told us four things with clarity.

(a) Firstly, he said that the Marshall Islands has no intention to give up the case it sought to make out in the Application — and he did so without offering any explanation for the language used in paragraph 47 of the Memorial.

(b) The second thing he told us was that India continues — in his words in "this proliferation of its nuclear capabilities"[4]. He characterized this as evidence of lack of good faith. *He added that it was also true that the Marshall Islands contends that India's quantitative build-up and qualitative improvement of its nuclear arsenal is not compatible with its obligations under customary international law.*

(c) The third thing he said was that the Marshall Islands does not claim that India is under an obligation of unilateral disarmament[5].

(d) The fourth thing he told us was, what is set out in paragraph 105, under 2 (F) of the Court's Advisory Opinion is central to the Marshall Islands' case.

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[4]CR 2016/6, p. 9, para. 4.

[5]*Ibid.*, p. 10, para. 7.

9. Mr. Burroughs, who followed, argued that even if, *arguendo,* a dispute over India's possession of nuclear arsenals might be considered to fall within the ambit of reservation 4, as we say it does, the Court's jurisdiction would still not be excluded because, in his words, "the subject-matter of the dispute concerns the obligation to pursue in good faith and conclude negotiations on nuclear disarmament in all its aspects, not the legality of possession, deterrence, and use or threatened use of nuclear weapons"[6].

10. He hastened to add, that the Marshall Islands was *not abandoning any claim* made in the Application. He did not explain how those claims, kept in reserve for the merits hearing, would pass the jurisdictional muster.

11. The Marshall Islands seeks a declaration from this Court that India has violated and continues to violate its international obligations under customary international law by taking actions to quantitatively build up its nuclear forces, to qualitatively improve them, and to maintain them for an indefinite future. It seeks an order compelling India to take steps to comply with its obligations under customary international law with respect to cessation of the nuclear arms race at an early date *"and nuclear disarmament within one year of the Judgment"*[7]. The place of negotiations — in their scheme of things, is secondary, for the order it seeks is that India take steps for disarmament "including the pursuit, *by initiation if necessary*, of negotiations in good faith aimed at the conclusion of a convention on nuclear disarmament . . .". And yet, Mr. van den Biesen tells this Court that the Marshall Islands does not seek unilateral disarmament.

12. Mr. Burroughs' submissions candidly acknowledge two things:

(a) The Marshall Islands attempts to run this case in two parts. The formulation at the jurisdictional challenge stages, as in paragraph 47 of the Memorial, is to allow the Marshall Islands develop possible — even if weak — answers to some of the challenges on the reservations. The real case was kept back to be argued if the jurisdictional bridge was crossed.

(b) The Marshall Islands will pursue the remedies in the Application if they get past the jurisdictional challenge. But for the present the Court should not ask how! This is for the

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[6]CR 2016/6, p. 22, para. 12.

[7]Application of the Marshall Islands (AMI), 24 Apr. 2014, p. 26.

reason that the exposure of the real disputes that would arise from the remedies sought and the claims made would be fatal to the maintainability of the Application.

13. Remedies under Article 36, Mr. President and Members of the Court, have to be pursued in good faith and one of the first elements of good faith is candour in pleadings. The conduct of the Marshall Islands in conducting these proceedings falls far short of this standard — it was rightly, I submit, even if harshly, criticized by me as an abuse of process.

14. The *Bolivia* v. *Chile* Judgment provides cold comfort to the Marshall Islands — on the contrary it provides a strong study in contrast.

(a) In *Bolivia* v. *Chile*, Bolivia sought a declaration that "Chile must perform the said obligation in good faith, promptly, formally, within a reasonable time and effectively, to grant Bolivia a fully sovereign access to the Pacific Ocean"[8].

(b) Bolivia while responding to the challenge to jurisdiction, however, made it clear that "the result of those negotiations and the specific modalities of sovereign access are not matters for the Court but, rather, are matters for future agreement to be negotiated by the Parties in good faith"[9].

(c) Accepting this position, the Court held, in paragraph 32, that the distinct dispute presented by the Application was only whether Chile had an obligation to negotiate such sovereign access to the sea, and if it did have such an obligation whether it was in breach thereof.

15. The reason is that Bolivia does not resort to the dual strategy of limiting its dispute to defend jurisdiction while reserving the right to seek remedies and orders far beyond the formulation of the dispute.

16. Professor Alain Pellet and I have both dealt, and will both deal, with the arguments on all the bases, in the alternative, as is necessary. Mr. van den Biesen possibly misunderstood this as a softening of India's case.

17. Mr. van den Biesen's submits, as also Mr. Burroughs acknowledges, that the Application pivots around paragraph 105 of the Advisory Opinion and the formulation in paragraph 2 (F) of the

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[8] *Obligation to Negotiate Access to the Pacific Ocean (Bolivia* v. *Chile)*, Judgment of 24 September 2015, para. 11.

[9] *Ibid.*, para. 30.

dispositif. To identify the contours of the case and to flush out some of the fallacies in their submissions, it would be necessary to explore, albeit briefly, some of the observations of the Court in the Advisory Opinion.

18. I do no more than quoting some of the observations:

(a) In paragraph 17, dealing with the impact of its opinion on disarmament negotiations, this Court observed that "no matter what might be its conclusions in any opinion it might give, they would have relevance for the continuing debate on the matter in the General Assembly and would present an additional element in the negotiations on the matter".

(b) In paragraph 33, this Court noticed that "existing international law relating to the protection and safeguarding of the environment does not specifically prohibit the use of nuclear weapons . . .".

(c) Noticing the various treaties dealing with the acquisition, manufacture, possession, etc., of nuclear weapons this Court said that these treaties "certainly point to an increasing concern in the international community with these weapons; the Court concludes from this that these treaties could therefore be seen as foreshadowing a future general prohibition of the use of such weapons, but they do not constitute such a prohibition by themselves"[10].

(d) On the issue of deterrence, this Court noticed that members of the international community are profoundly divided on the matter of whether non-recourse to nuclear weapons over the past 50 years constitutes the expression of an *opinio juris*. Under these circumstances the Court did *not* "consider itself able to find that there is such an *opinio juris*"[11].

(e) Paragraphs 70 to 72 find that the General Assembly resolutions "still fall short of establishing the existence of an *opinio juris*"[12] and that the emergence of a customary rule specifically prohibiting the use of nuclear weapons was "hampered by the continuing tensions between the nascent *opinio juris* on the one hand, and the still strong adherence to the practice of deterrence on the other"[13].

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[10] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 253, para. 62.

[11] *Ibid.*, p. 254, para. 67.

[12] *Ibid.*, p. 255, para. 71.

[13] *Ibid.*, p. 255, para. 73.

(f) In paragraph 96 the Court said "the Court cannot lose sight of the fundamental right of every State to survival, and thus its right to resort to self-defence, in accordance with Article 51 of the Charter, when its survival is at stake. Nor can it ignore the practice referred to as 'policy of deterrence', to which an appreciable section of the international community adhered for many years."

(g) Paragraph 97 followed this by saying, "[a]ccordingly, in view of the present state of international law viewed as a whole, as examined above by the Court, and of the elements of fact at its disposal, the Court is led to observe that it cannot reach a definitive conclusion as to the legality or illegality of the use of nuclear weapons by a State in an extreme circumstance of self-defence, in which its very survival would be at stake".

(h) The Court then recognized that it was necessary to "put an end to this state of affairs: the long-promised complete nuclear disarmament appears to be the most appropriate means of achieving that result"[14]. The Court appreciated the full importance of the recognition by Article VI of an obligation to negotiate in good faith a nuclear disarmament treaty. This obligation was described as follows "the obligation involved here is an obligation to achieve a precise result — nuclear disarmament in all its aspects — by adopting a particular course of conduct, namely, the pursuit of negotiations on the matter in good faith"[15].

(i) Having spelt out the obligation the Court hastened to add, "[t]his twofold obligation to pursue and to conclude negotiations formally concerns the 182 States parties to the Treaty on the Non-Proliferation of Nuclear Weapons, or, in other words, the vast majority of the international community"[16].

19. Three indisputable conclusions follow from these observations — there is no need to await a hearing on merits to identify these clear conclusions.

(a) Firstly, nothing in the observations suggests a theory of legal obligations necessary to sustain the remedies sought in the Applications — which squarely impinge upon India's nuclear programme.

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[14] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 263, para. 98.

[15] *Ibid.*, p. 264, para. 99.

[16] *Ibid.*, p. 264, para. 100.

(b) Secondly, the Court recognized that an appreciable section of the international community pursued the principle of deterrence, and that the right of a State to defend itself when its survival was at stake, was also a right guaranteed by customary international law as well as Article 51.

(c) Thirdly, the obligation, which the Court found in Article VI of the NPT, was enforceable against all the States which were parties to the NPT — but which included a wide majority of the international community as 182 States had signed the NPT. The use of the word "formally" is really dispositive of this issue — the suggestion to the contrary by Professor Chinkin is plainly wrong — surely this Court was not suggesting that the Treaty would be enforceable other than formally, on non-parties.

20. Even assuming *arguendo* that the Marshall Islands is entitled to contend at this jurisdictional hearing, that the Court proceed to examine the dispute as being centred around Article VI of the NPT, the Application would on that basis not only be foredoomed to failure, but would fail to disclose with a modicum of cogency a real dispute between the Parties, and fail as well for the want of the presence of other States.

21. But, Mr. President, Members of the Court, I submit, this is a wrong basis to defend jurisdictional challenges. The reservations cannot be bypassed by placing the real disputes under an opaque veil. I had, in my opening oral submissions, read to you extracts from the declarations and the order sought by the Marshall Islands — I invite the Court to read them again and examine whether Mr. van den Biesen, Mr. Burroughs, and Professor Chinkin have explained any principles on which these remedies can be sustained.

FAILURE TO NEGOTIATE PRIOR TO FILING THE APPLICATION

22. Professor Condorelli, with his considerable forensic skill, seeks to get past my submissions on the need for prior negotiations by suggesting that India was now in a dispute with the Court. He needed this extreme submission to divert attention from what he possibly considered an unanswerable point.

SEPARATE OPINION OF JUDGE SIR HERSCH LAUTERPACHT

While I concur in the operative part of the Judgment inasmuch as the Court has declared itself incompetent to decide on the merits of the case submitted to it, I much regret that I do not find myself in agreement with the grounds of the Judgment. As the issues involved are intimately connected with the nature of the decisions of the Court in the matter of its competence, as well as with some basic questions of its obligatory jurisdiction, I consider it my duty to indicate in some detail my own position on the subject.

The Judgment of the Court is based exclusively on the finding that the Court is bound to decline jurisdiction for the reason that Norway has invoked the reservation, operating by virtue of reciprocity, of the French Declaration of Acceptance in which the French Government excluded from the jurisdiction of the Court "matters which are essentially within the national jurisdiction, as understood by the Government of the French Republic".

There are two reasons for which I find myself compelled to dissent from the grounds of the Judgment thus expressed. In the first instance, assuming—an assumption which I must reject—that the French Declaration of Acceptance is a text which is valid in law, the question of jurisdiction must, in my view, be decided by reference to substantive Preliminary Objections advanced by the defendant Government rather than by reference to the subsidiary Objection referred to above. Secondly, and principally, I consider that as, in consequence of the latter reservation, the French Declaration of Acceptance is invalid, there is before the Court no text the reservations of which it can apply. This fact, and not the Norwegian reliance upon the French reservation of matters of national jurisdiction, is in my view the true reason why the Court has no jurisdiction in the present case.

In this Separate Opinion I propose, for the sake of abbreviation, to use the term "automatic reservation" to indicate the French reservation of "matters which are essentially within the national jurisdiction, as understood by the Government of the French Republic". That description expresses the automatic operation of that reservation in the sense that, by virtue of it, the function of the Court is confined to registering the decision made by the defendant Government and not subject to review by the Court.

facie, within that category for the reason that normally the State exercises its activity within its national territory, or, on the high seas, in relation to its ships which for some purposes are considered by States to form part of its territory. In the *Lotus* case the Court was prepared to base its decision, to some extent, on the view that the ship affected was Turkish territory and that the offence was therefore committed in Turkey. For these reasons it is possible for a State to maintain, without necessarily laying itself open to an irresistible charge of bad faith, that practically every dispute concerns a matter essentially within its domestic jurisdiction. Most Judgments given by this Court and its predecessor—with the exception of those concerned with territorial disputes—have been given in relation to matters bearing on the activity of the State within its jurisdiction and related to its national legislation and administration. These are the typical occasions giving rise to State responsibility. This aspect of the question is elaborated in more detail in the examination, which follows, of the power of the Court to review the determination made by a Government in pursuance of the "automatic reservation".

If thus practically every matter can be plausibly, though not necessarily accurately, described as a matter essentially within the domestic jurisdiction of the State concerned and if that State is the sole judge of the question, it is clear that, as the result, the element of legal obligation is reduced to a vanishing point.

* * *

I will now examine the view that, although a State reserves for itself the right to determine whether a matter is essentially within its domestic jurisdiction, such determination must be effected in accordance with the legal obligation to act in good faith and that to that extent there is in existence a valid legal obligation and a valid legal instrument. I myself expressed a view to that effect in my *Report on the Law of Treaties* which I submitted in 1953 as member of the International Law Commission. In the light of further study of this question in connection with the present case, I do not feel it possible to adhere to that view. The legal obligation of a Government to avail itself of its freedom of action in a manner consistent with good faith has a meaning, in terms of legal obligation, only when room is left for an impartial finding whether the duty to act in accordance with good faith has been complied with. But in the case now before the Court any such possibility has been expressly excluded. The Court has no power to give a decision on the question whether a State has acted in good faith in claiming that a dispute covers a matter which is essentially within its domestic jurisdiction. If the Court were to do so, it would

be arrogating to itself a power which has been expressly denied to it. Unquestionably, the obligation to act in accordance with good faith, being a general principle of law, is also part of international law. The Governments which have appended the "automatic reservation" have not questioned their legal obligation to invoke it in good faith, that is to say, not capriciously and arbitrarily. But it is abundantly clear from the evidence which is generally available that the authors of the "automatic reservation" have reserved for the Governments concerned the right to judge whether in invoking it in a particular case they have complied with the obligation to act in good faith. They have repeatedly declared that their own sense of international duty and propriety, public opinion within and outside their countries, and their reputation and prestige in the world would constitute a restraining factor of great potency in shaping their decision. But they have denied to the Court the power to determine the legality of that decision from the point of view of the obligation to act in good faith or otherwise. They have reserved that power to themselves.

For this reason I cannot accept as accurate the view expressed in the following terms in paragraph 26 of the Norwegian "Preliminary Objections": "Of course, such a reservation must be interpreted in good faith and should a government seek to rely upon it with a view to denying the jurisdiction of the Court in a case which manifestly did not involve a 'matter which is essentially within the the national jurisdiction' it would be committing an *abus de droit* which would not prevent the Court from acting." The Court has no such power. It cannot arrogate to itself the competence—which has been expressly denied to it—to find that the assertion of the defendant State that a matter is essentially within its domestic jurisdiction is so extravagant and so arbitrary as to amount to an action in bad faith and to an abuse of right, with the result that the Court is entitled to ignore or to override the determination thus made. As already stated, in view of the comprehensiveness of the term "matters essentially within domestic jurisdiction", it is not easy to conceive situations of any such obviousness. It is not certain that a State would be acting flagrantly and irrefutably in disregard of the canons of good faith if it were to determine most disputes as coming within its domestic jurisdiction.

The question of the obligation to act in good faith arises only in relation to legitimate expectations of the other party. But there is only a nominal degree of legitimate expectation in relation to an obligation, in regard to a potentially most comprehensive category of disputes, as to which the party undertaking it expressly declares in advance that it is free to determine both the existence and the degree of its obligation. As already stated, the attitude of a Government in most disputes is as a rule adopted in pursuance of its internal legislation or other form of authorization determined by its national law. To that extent it is arguable—perhaps inaccurately but not

necessarily extravagantly so—that any dispute arising in this connection is essentially a matter of domestic jurisdiction. Also, practically all disputes involving an allegation of a breach of an international duty, whether under a treaty or under customary international law, arise out of events occurring within the territory of that State. In that sense it may be claimed, with or without good reason, that they are matters essentially within the national jurisdiction of the State. A dispute relating to the jurisdictional immunities of foreign States or their diplomatic agents may be asserted to fall within that category—especially if its subject-matter is covered by national legislation or the jurisprudence of national courts. A defendant State may allege that, for the latter reason, a dispute concerning its domestic legislation affecting the continental shelf or parts of the high seas relates to a matter within its national jurisdiction. The only disputes which, it might appear, are outside that category are territorial disputes. But even that is not certain. In fact it has been suggested that territorial disputes pertain to matters of domestic jurisdiction. In the communication addressed on May 4th, 1955, by the Government of Argentina to the United Kingdom in the matter of disputed sovereignty over certain Antarctic territories one of the reasons adduced in support of the refusal of the former Government to submit the issue to this Court was that the Government of the United Kingdom had, in its acceptance of the Optional Clause, itself excluded from the competence of the Court questions within its exclusive jurisdiction. The contention that a territorial dispute involves a matter within the domestic jurisdiction of a State may be farfetched, but has the Court been given the power to say that any such assertion is obviously in bad faith, that it constitutes an abuse of a right, that it must be ignored or overridden, and that the Court has jurisdiction notwithstanding the determination to the contrary by the State in question?

Any attempt to embark upon the examination of the question whether a Government has acted in bad faith in determining that a matter is essentially within its domestic jurisdiction may involve an exacting enquiry into the merits of the dispute—an enquiry so exacting that it could claim to determine, with full assurance, that the juridical view advanced by a Government is so demonstrably and palpably wrong and so arbitrary as to amount to an assertion made in bad faith. Only an enquiry into the merits can determine that although an assertion made by the defendant Government is not legally well-founded it is nevertheless reasonable; or that although it is not reasonable, it is not wholly arbitrary. The Court has no power to make such determination.

The "automatic reservation" is couched in terms so comprehensive as to preclude the Court from reviewing it or interpreting it

away not only by reference to any assertion of abuse of a right by the defendant State but also in any other way. Thus, for instance, it is not open to the Court to disregard that reservation by reference to some such argument as that the right of exclusive determination pertains only to matters which are "essentially within domestic jurisdiction"; that a matter which is clearly governed by international law, because of international custom or treaty, is not essentially within the domestic jurisdiction of a State; and that, therefore, such matters are neither within the scope of the reservation nor within the power of the accepting State to determine unilaterally whether the dispute is within the domestic jurisdiction. It is not easy to find a legal limit to the right of the accepting State which has appended a reservation of this kind to decline the jurisdiction of the Court. That right seems to be unqualified. So is the inability of the Court to review the attitude of the Government in question. That very absence of qualification is expressive of the absence of any element of legal obligation implicit in a reservation thus formulated.

Having regard to the preceding observations I am of the view that the right of the accepting State to determine whether a matter is essentially within its domestic jurisdiction makes the extent and the very existence of its obligation dependent upon its will; that the subject-matter of such determination may cover practically all disputes; that the Court has no power to disregard a determination thus made on the ground that it has not been made in good faith or an any other ground; and that the reservation of domestic jurisdiction thus formulated is therefore invalid inasmuch as it deprives the Acceptance of the essential element of legal obligation.

3. *Can the "automatic reservation" be separated from the Acceptance as such ?*

I have come to the conclusion that the "automatic reservation" relating to matters deemed by the Government of France to be essentially within her national jurisdiction is invalid for the double reason that it is contrary to the Statute of the Court and that it deprives the Acceptance of the indispensable element of legal obligation.

If the clause of the Acceptance reserving to the declaring Government the right of unilateral determination is invalid, then there are only two alternatives open to the Court: it may either treat as invalid that particular part of the reservation or it may consider the entire Acceptance to be tainted with invalidity. (There is a third possibility—which has only to be mentioned in order to be dismissed—namely, that the clause in question invalidates not the Acceptance as a whole but the particular reservation. This would mean that the entire reservation of matters of national jurisdiction

Non-Corrigé
Uncorrected

Traduction
Translation

CR 96/8 (traduction)

CR 96/8 (translation)

Mercredi 1er mai 1996 (10 heures)

Wednesday 1 May 1996 (10 a.m.)

66 But above all, while it is true that genocide, the object of the present proceedings, is no longer, if I may say so, "in its active phase", and while, in practical terms, the urgency may therefore perhaps seem less acute than some months ago, the fact nevertheless remains that the determination of the responsibilities - of all the responsibilities, the personal ones by the International Criminal Tribunal for the Former Yugoslavia, and also State responsibilities by your distinguished Court - this determination, as I was saying and as Ambassador Sacirbey pointed out not long ago, constitutes one of the indispensable conditions for the normalization of the situation.

17. The Government of Bosnia-Herzegovina is not unaware that an objection may come to mind. Indeed, at the start of the present proceedings, that Government itself requested an extension of the time-limit for its own Memorial; but, as it explained in his written observations (pp. 4-5, para. 12), and as reiterated just now by the Agent of Bosnia-Herzegovina, it was forced to do so, against its will, by the dramatic situation in its country. Since then, it has done everything in its power to speed up the proceedings and obtain a decision on the merits, a decision which Yugoslavia is seeking to defer by unjustifiable means. To do so, it is exploiting all the resources of the procedure in order to prevent the Court from making a determination, while Yugoslavia knows that it has no plausible argument against the jurisdiction of the Court or the admissibility of the Application. For Yugoslavia, it is not a matter of ensuring that its own rights are respected, but of preventing Bosnia-Herzegovina from exercising its own rights and, first and foremost, the right to obtain a judgment from the highest court in the world on the genocide essentially perpetrated on its own territory,

essentially against its own nationals. By such action, the Respondent displays its contempt for Bosnia and prejudices the dignity of the Court itself. This, Mr. President, corresponds exactly to the definition of an abuse of rights.

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As Sir Gerald Fitzmaurice has said:

> "[a] State which, though not with the actual object of breaking an international obligation as such, uses its right to apply them in a certain way, in such a manner that the obligation is not in fact carried out, may be said to have committed an abuse of rights" ("The Law and the Procedure of the International Court of Justice, 1954-59: General Principles and Sources of International Law", *BYBIL* 1959, p. 209);

or, more simply as, Mr. Alexandre-Charles Kiss has written, the "unjustified and unjustifiable" exercise of State powers may be considered to be an abuse of rights ("L'abus de droit en droit international" [The Abuse of Rights in International Law], *LGDJ*, Paris, 1953, p. 186).

There is no doubt that the concept is an established one in international law, as is seen from the case-law of the Court, particularly the Judgments delivered by the Permanent Court of International Justice in the cases concerning *Certain German Interests in Polish Upper Silesia, Merits, Judgment No. 7, 1926, P.C.I.J., Series A, No. 7*, p. 30 and *Free Zones of Upper Savoy and District of Gex, Order of 6 December 1930, P.C.I.J., Series A, No. 24*, p. 12 and *Judgment, 1932, P.C.I.J., Series A/B, No. 46*, p. 167. More recently in the case concerning *Certain Phosphate Lands in Nauru*, the Court discussed the possibility of an abuse of process although dismissing such a possibility in that case.

18. The question then arises of determining the possible consequences of Yugoslavia's manifestly improper behaviour. There is no doubt that serious damage has been done and is still being done to Bosnia-Herzegovina by the attitude taken by the Respondent State in the proceedings; and the question then arises as to what compensation it might claim.

The Bosnian Government places itself unreservedly in the Court's hands on that point. However, irrespective of the compensation to which it is entitled, for instance in the form of a declaration by the Court to the effect that Yugoslavia misused its procedural rights (cf. *Corfu Channel, Judgment of 9 April 1949, I.C.J. Reports 1949*, p. 36), it appears to the Bosnian Government that once the Court has ruled on its jurisdiction, a legitimate reaction would be to fix time-limits for resuming proceedings, time-limits which would be as short as is compatible with a fair trial.

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19. Bosnia-Herzegovina for its part intends to firmly maintain the strategy it adopted both in its Memorial and in its observations on Yugoslavia's objections, however improper these may have been. It will refute the Yugoslav arguments as thoroughly as possible, without dwelling on them longer than is reasonable; this is why moreover it did not seem indispensable to us to have the same amount of time for our reply as Yugoslavia most improperly demanded for presenting its own oral arguments: the Court's time is precious; the Respondent's arguments are often futile.

Mr. President, Members of the Court, it is in this spirit that I now come to the second part of my oral argument and shall attempt to enumerate the various grounds for the Court's jurisdiction in this case.

DECLARATION OF JUDGE KEITH

1. While I agree fully with the decision reached by the Court in this case, I disagree with aspects of its reasoning relating to France's refusal to comply with Djibouti's letter rogatory. I will take this opportunity to explain why.

2. The Court concludes that France's refusal to comply with Djibouti's letter rogatory was not in breach of France's obligations under the 1986 Convention because the refusal was for reasons which fell within the scope of Article 2 *(c)* of the Convention (Judgment, para. 148). The only statement of reasons for that refusal on which the Court relies and, as it explains (*ibid.*, para. 146), may rely is that formulated by Judge Clément in her *soit-transmis* of 8 February 2005.

3. Article 2 of the Convention provides as follows:

> "Assistance may be refused:
>
> *(a)* if the request concerns an offence which the requested State considers a political offence, an offence connected with a political offence, or a fiscal, customs or foreign exchange offence;
>
> *(b)* if the request concerns an offence which is not punishable under the law of both the requesting State and the requested State;
>
> *(c)* if the requested State considers that execution of the request is likely to prejudice its sovereignty, its security, its *ordre public* or others of its essential interests."

4. The power of the requested State to refuse assistance under Article 2 *(c)* is particularly broad, when all the features of its wording are considered both in their own terms and by comparison with the wording of subparagraphs *(a)* and *(b)* of the provision. Notwithstanding that, I agree with the Court that it has power to examine the reasons even though that power of examination is very limited. In support of its power, the Court refers to the proposition codified in Article 26 of the Vienna Convention on the Law of Treaties and to two judgments of the Permanent Court of International Justice as affirming that the concept of good faith applies to the exercise of such broad powers, and to two judgments of its own as affirming the competence of the Court when faced with treaty provisions giving wide discretion (Judgment, para. 145). The limited extent of that power, as understood by the Court, appears clearly from its consideration of the reasons given by the judge for her conclusion that transmitting the file would be "'contrary to the essential interests of France'": in the Court's words, "the file contained declassified

'defence secret' documents, together with information and witness statements in respect of another case in progress". To support that conclusion, the Court does no more than quote six sentences from the judge's reasons which appear to relate only to the declassified documents and not at all to the other "case in progress" (Judgment, para. 147). The Court also mentions the question whether part of the file could have been handed over, but that, as it indicates, is not a matter which the judge addresses in her reasons (*ibid.*, para. 148). Before I consider her reasons, I supplement the Court's discussion of the law relevant to the exercise of such broadly worded powers.

5. The two decisions of the Permanent Court of International Justice to which the Court refers support not only absence of good faith but also abuse of rights as a restraint on the exercise by a State of a power conferred on it by a treaty. This Court in the *Admissions* opinion in 1948 similarly said that, while Article 4 of the Charter of the United Nations exhaustively prescribes the conditions for the admission of new Members, that provision did not "forbid the taking into account of any factor which it is possible reasonably and in good faith to connect with [those] conditions"; further, Article 4 allowed for "a wide liberty of appreciation" (*Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), Advisory Opinion, 1948, I.C.J. Reports 1947-1948*, pp. 63-64; see also the joint dissenting opinion, pp. 91-92, para. 20). And counsel for France accepted that the principles of abuse of rights and misuse of power *(abus de droit* and *détournement de pouvoir)* may be relevant to the exercise of the power in issue in this case. The Agent added that, while the requested State retains for itself a wide discretion, this in no way means that States indiscriminately invoke these derogation clauses; it is moreover obvious, she said, that the notion of essential interests remains very narrow, as the words themselves indicate.

6. I now consider the reasons given by the judge in her *soit-transmis* against the principles of good faith, abuse of rights and *détournement de pouvoir*. Those principles require the State agency in question to exercise the power for the purposes for which it was conferred and without regard to improper purposes or irrelevant factors. In the words of the Court in *Gabčikovo-Nagymaros Project (Hungary/Slovakia)* the good faith obligation reflected in Article 26 of the Vienna Convention "obliges the Parties [to a treaty] to apply it in a reasonable way and in such a manner that its purpose can be realized" (*Judgment, I.C.J. Reports 1997*, p. 79, para. 142). (The International Law Commission similarly states in its commentary to what became Article 26 of the Vienna Convention that it is implicit in the requirement of the good faith application of treaty obligations that a party must abstain from acts calculated to frustrate the object and purpose of the treaty (*Yearbook of the International Law*

Commission, 1966, Vol. II, p. 211, para. 4; see also the other authorities cited in paragraph 2). The general purpose of the 1986 Convention is indicated by its Article 1: the Parties are to afford each other, in accordance with the provisions of the Convention, the widest measure of judicial assistance in criminal matters. Among the relevant provisions of the Convention are Articles 2 and 3, the latter of which regulates in part the obligation to respond to letters rogatory. In relation to Article 3, the Court, as it says, cannot question the decision of the competent French court that under French law it is the investigating judge who has the determinative role (Judgment, para. 146). That brings the matter back to Article 2 *(c)*, for the investigating judge cites no other provision to justify her refusal, and to the reasons which she gives in her *soit-transmis* for that refusal.

7. Did the judge in her *soit-transmis* have regard to matters not within the scope of Article 2 *(c)* in breach of the principles of law mentioned above? In two respects, she appears to have done that. First, the judge says that the October 2004 opening of the investigation by Djibouti "appears to be an abuse of process"; this may well have been a reason for her saying in 2005, as she had said in 2004, that the request did not conform with the Convention in terms of its statement of the object of and reason for the request, a requirement specifically laid down in Article 13 of the Convention; but the ground on which she is depending for refusing the request is rather that she has reason under Article 2 *(c)* to take that action. In my view this appears to be an abuse of power or a *détournement de pouvoir* — an exercise of the power for wrong reasons and a thwarting of the purpose of the Convention. Second, the judge refers to the refusal of one of the Djibouti officials to respond to a witness summons. That is again a matter that has nothing to do with Article 2 *(c)*, and again is an apparent abuse of power.

8. I say that in those two respects the judge "appears" to have refused to exercise the power for the wrong reasons, outside the scope of Article 2 *(c)*, since it may be that she sets out those two matters simply as part of the narrative. It is definitely the case however that in the final part of the *soit-transmis* the judge not only returns to the requirement of Article 13 but links it to the power of the requested State under Article 2 *(c)*:

> "Moreover, while Article 13 *(b)* of the Convention . . . states that requests for assistance must indicate the object of and the reason for the request, *which was not done in the present case*, Article 2 *(c)* of the Convention also provides that the requested State may refuse a request for mutual assistance if it considers that execution of the request is likely to prejudice its sovereignty, its security, its *ordre public* or others of its essential interests.

> That is the case with regard to transmission of the record of our proceedings." (Emphasis added.)

The judge, having recalled in the next three sentences that certain documents which had earlier been classified as "defence secrets" had been declassified and had been transmitted to her, concludes as follows:

> "To accede to the Djiboutian judge's request would amount to an abuse of French law by permitting the handing over of documents that are accessible only to the French judge.
>
> Handing over our record would entail indirectly delivering French intelligence service documents to a foreign political authority.
>
> Without contributing in any way to the discovery of the truth, such transmission would seriously compromise the fundamental interests of the country and the security of its agents."

It is striking that in that passage the judge makes no assessment at all, in terms of Article 2 *(c)*, of the likely prejudice that the release of the particular declassified documents would present to national security. Although she knows those documents and it is she who, under French law, is to make the definitive determination, she makes that determination only in the most general terms, without drawing in any express way on her particular knowledge. The documents had been declassified, and, in terms of the judge's reference to the threat to "security of . . . agents" resulting from the transmission of the file, the identity of the authors of certain documents was, as appropriate, to be protected in terms of the declassification ruling of the advisory committee (see its Avis 2004-12 of 2 December 2004 relating to 13 of the documents).

9. Moreover, to return to a point which the Court raises (Judgment, para. 148 and see para. 4 above), the judge gives no indication of why it would not be enough to withhold just the 25 declassified documents (consisting of about 50 pages) which she identifies and why the totality of the 35 volumes of the record must be withheld. It is significant in that respect that in a letter of 6 January 2005, the Minister of Defence had indicated that he was not opposed to the partial handing over of the file (see paragraphs 26 and 37 of the Judgment). The judge does not say, as counsel for France does, consistently with France's Counter-Memorial, that the entire file in those volumes is rife *(irrigué)* with the sensitive information; but that counsel frankly informed the Court that he had not seen the notes in question. On what basis then could he argue that the record was permeated by the declassified documents? Nor does the judge call attention to the fact, as counsel for France informed the Court, that Djibouti's request of seeking the whole file was particularly rare. Given that usual practice, the presence of only 25 sensitive documents from the bulky file, and given the purpose of the Convention, this appears to be a plain case

for the judge to suggest to the Djiboutian authorities that they reconsider the scope of their request. In failing to address expressly those two alternative methods of affording Djibouti the widest measure of judicial assistance in terms of Article 1 of the Convention, while protecting the interests stated in Article 2 *(c)*, the judge has not, in my view, had proper regard to the purpose of the Convention. This conclusion is supported by the ruling of the Court, with which I agree, that the Convention is to be interpreted and applied in a manner which takes into account the friendship and co-operation which the two States posited as the basis of their mutual relations in the Treaty of 1977 (Judgment, para. 113; see also para. 114).

10. It may be countered that the examination of the *soit-transmis* which I have undertaken in paragraphs 7 to 9 above is not appropriate, given the extent of the power conferred by Article 2 *(c)*, the nature of a State's assessment under that provision of its national interests and the need to defer in the usual case to that assessment. Two responses may be given. The first is that the examination does not in any way question the substantive assessment by the requested State of likely prejudice to its national interests. The examination is much more confined and directed to a distinct matter — the purpose of the Convention under which the power is to be exercised. It does not involve any attempt to assess and weigh the matters covered by Article 2 *(c)*. The second response relates to the obligation, set out in Article 17, of a State refusing a request to give reasons to the requesting State. Such an obligation has several purposes: it places a discipline on the decision maker refusing a request under Article 2 or any other relevant provision of the Convention including Articles 1 (2), 10 or 13; the reasons inform the requesting State whether the power has been properly exercised in accordance with the law; and the statement may enable the requesting State to take follow-up steps to repair any flaw in its request, as the Court says in its Judgment (paragraph 152; see also paragraph 9 above). I should add that, while the two Parties did not approach the case exactly in the way I have, both accepted that the power conferred by Article 2 on the requested State was subject to some limits and addressed the elements discussed above.

11. It does not follow that, because France, in my view, has not complied with the Convention in making its decision under Article 2 *(c)*, it is obliged to transmit the file either in whole or within the terms and conditions determined by the Court, as requested by Djibouti in its final submissions. On the contrary, as I see the matter, France has yet to make a decision, in accordance with the law, in response to the letter rogatory, on the substance of the issues presented by the request and in particular by Article 2 *(c)* of the Convention. For me, one fact is very significant in

determining what remedy, if any, would have been appropriate in respect of that failure. That fact is the failure of Djibouti, following the receipt by its Foreign Minister of the letter of 6 June 2005 from the French ambassador communicating France's refusal to comply with the request, to take any action at all to seek the reversal or the elucidation of that refusal. That was so, as the Court recalls (Judgment, paras. 30 and 144), although the Minister, only 20 days earlier, had complained to the Ambassador that France had not yet honoured "its commitments", as he put it, given in the letter of 27 January 2005, to hand over the file. That failure, taken with the passage of time, would in my view have led to the denial of any positive remedies such as those claimed by Djibouti in its final submissions in respect of the French refusal.

(Signed) Kenneth KEITH.

PUBLICATIONS DE LA COUR PERMANENTE DE JUSTICE INTERNATIONALE

SÉRIE A — N° 24

RECUEIL DES ARRÊTS

AFFAIRE DES ZONES FRANCHES DE LA HAUTE-SAVOIE ET DU PAYS DE GEX

(DEUXIÈME PHASE)

ORDONNANCE DU 6 DÉCEMBRE 1930

PUBLICATIONS OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE

SERIES A.—No. 24

COLLECTION OF JUDGMENTS

CASE OF THE FREE ZONES OF UPPER SAVOY AND THE DISTRICT OF GEX

(SECOND PHASE)

ORDER OF DECEMBER 6th, 1930

LEYDE
SOCIÉTÉ D'ÉDITIONS
A. W. SIJTHOFF
1930

LEYDEN
A. W. SIJTHOFF'S
PUBLISHING COMPANY
1930

the French Republic to the Documents, Proposal and Observations submitted on behalf of the Swiss Government" and the "Reply of the Swiss Government to the Observations, Proposal and Documents submitted on behalf of the Government of the French Republic", as also to the documents annexed to the foregoing, duly filed by the Parties on July 31st and September 30th, 1930;

Having regard also to the documents filed by the Parties in the course of the oral proceedings;

Having duly heard the oral arguments presented by Me Paul-Boncour and M. Logoz, and the replies made by Me Paul-Boncour, M. Basdevant and M. Logoz on October 23rd, 24th, 25th, 27th, 28th, 29th and 31st, and November 1st, 3rd and 4th, 1930; having also heard the statements of M. Basdevant and M. Logoz concerning the interpretation to be placed on Article 2, paragraph 2, of the Special Agreement, made by them at the request of the Court on November 24th, 1930,

Makes the following Order:

Whereas under Article 2, paragraph 1, of the Special Agreement, it rests with the Court, by means of a single judgment delivered in conformity with Article 58 of the Statute, to pronounce its decision on the question formulated in Article 1 of the aforesaid Special Agreement and to settle, for a period to be fixed by it and having regard to present conditions, all the questions involved by the execution of paragraph 2 of Article 435 of the Treaty of Versailles;

Whereas in its deliberation on the questions formulated in Article 1, paragraph 1, of the Special Agreement, the Court came to the conclusion that, as between France and Switzerland, Article 435, paragraph 2, of the Treaty of Versailles, with its annexes, had not abrogated the provisions of the Protocol of the Conference of Paris of November 3rd, 1815, of the Treaty of Paris of November 20th, 1815, of the Treaty of Turin of March 16th, 1816, and of the Manifesto of the Sardinian Court of Accounts of September 9th, 1829, regarding the customs and economic régime of the free zones of Upper Savoy and the District of Gex, and also that it was not intended necessarily to lead to the abrogation of these

provisions ; whereas the conclusions of this deliberation, based on the interpretation of Article 435, paragraph 2, of the Treaty of Versailles, with its annexes, and on the existence of a right on the part of Switzerland to the free zones in virtue of the aforesaid provisions, have been confirmed by the Court as at present composed and must be regarded as established for the purposes of the continuation of the proceedings ; as, in the course of the present phase of the case, the French Government has not argued that the old provisions have lapsed as a result of the change in conditions ;

Whereas, accordingly, the conclusions of the Court's deliberation must serve as a basis for the settlement contemplated by paragraph 1 of Article 2 of the Special Agreement ; as, moreover, even assuming that it were not incompatible with the Court's Statute for the Parties to give the Court power to prescribe a settlement disregarding rights recognized by it and taking into account considerations of pure expediency only, such power, which would be of an absolutely exceptional character, could only be derived from a clear and explicit provision to that effect, which is not to be found in the Special Agreement ; as, on the other hand, it is hardly conceivable that a single judgment should contain, in the first place the interpretation of Article 435, paragraph 2, of the Treaty of Versailles, with its annexes, as between France and Switzerland, and then a settlement of the questions involved by the execution of that same clause, in so far as the same States are concerned, which settlement, nevertheless, would disregard or conflict with the interpretation given by the Court ; as it is likewise impossible to suppose that the Parties would have desired to be informed, before the negotiations referred to in Article 1, paragraph 2, of the Special Agreement, in regard to the points of law indicated in the first paragraph of that article, if, in the event of the failure of the negotiations, the Court was free to give its judgment on a basis other than that communicated to the Parties at the conclusion of its deliberation ; and as, furthermore, the whole of the procedure contemplated by Article 1 of the Special Agreement and the interpretative notes annexed thereto would cease to have any object if, for the purposes of the settlement of all the questions involved by the execution of Article 435, para-

graph 2, of the Treaty of Versailles, the interpretation given by the Court of this clause in the recitals of its Order of 1929 might be disregarded;

Whereas, as the Court has already stated in the recitals of its Order of August 19th, 1929, it follows from the indications afforded by the Preamble to the Special Agreement and by the history of the negotiations which have taken place between the Parties with a view to concluding the agreement provided for by Article 435, paragraph 2, of the Treaty of Versailles—which negotiations were adduced before the Court in the first phase of the proceedings—that the real difference of opinion which had prevented an agreement between the Parties related to the question whether the régime of the zones might be abolished without the consent of Switzerland, i.e. whether Switzerland has a right to the free zones; as it was precisely this difference of opinion which was submitted to the Court, and as it is from this standpoint that the Special Agreement must be construed;

Whereas, though it is certain that the Parties, being free to dispose of their rights, might have embodied, in the negotiations contemplated in Article 1, paragraph 2, of the Special Agreement, and might also in any future negotiations embody in their agreement any provisions they might desire and, accordingly, even abolish the régime of the free zones, it in no way follows that the Court enjoys the same freedom; as this freedom, being contrary to the proper function of the Court, could in any case only be enjoyed by it if such freedom resulted from a clear and explicit provision, which is not to be found in the Special Agreement; as the argument according to which the settlement to be prescribed by the Court would take the place of the negotiations between the two States and, consequently, the Court would enjoy the same freedom as those States in effecting the settlement, amounts in reality to assuming as demonstrated the very thing which has to be demonstrated;

Whereas, though the settlement to be prescribed by the Court with regard to all the questions involved by the execution of paragraph 2 of Article 435 of the Treaty of Versailles, must respect the rights which Switzerland derives from the provisions of the treaties of 1815 and other supplementary

instruments relating to the free zones, this settlement must also respect the sovereignty of France over the territories in question ; as this sovereignty is complete and unimpaired in so far as it is not limited by the aforesaid treaties ; as no obligation going beyond these treaties can be imposed on France without her consent ;

Whereas it is in the light of the foregoing considerations that the question of the so-called "control cordon" (*cordon de surveillance*) must be envisaged ; as France's right to have a police cordon at the political frontier of the zones has hardly been questioned by the Swiss Government ; as, on the other hand, the latter disputes the right of France to collect duties and taxes at this frontier, even if these charges are not duties on the importation or exportation of goods, but are duties and taxes which are also levied on the same articles produced or manufactured in France ; as such a restriction does not necessarily follow from the obligation contracted by France under the provisions of the treaties of 1815 and the other supplementary instruments relating to the free zones, and as, in case of doubt, a limitation of sovereignty must be construed restrictively ; as, though it is certain that France cannot rely on her own legislation to limit the scope of her international obligations, it is equally certain that French fiscal legislation applies in the territory of the free zones as in any other part of French territory ; as a reservation must be made as regards the case of abuses of a right, an abuse which however cannot be presumed by the Court ;

Whereas it follows from this principle that the Court cannot envisage the adoption in its judgment of provisions modifying the territorial delimitation of the zones, unless the French Government consents thereto ; as the same applies to Article 3 of the Swiss draft, in so far as it would limit to a greater degree than is done in the treaties the powers of French administration in the free zones, or impose on France the establishment of customs offices at the Geneva-Cornavin station, or provide that imports from Switzerland into the free zones would be exempt, not only from all customs duties but also from any taxes whatsoever ; as, in so far as concerns the last observation, the same is true with regard to Articles 4, 5 and 10 of the said draft ; as similar observations hold good also

with regard to Articles 11, 12 and 13, the provisions of which, wholly or in part, go beyond the law in force and cannot therefore become binding between the two States except in virtue of an agreement concluded between them.

* * *

Whereas, by acquiescing in Article 435 of the Treaty of Versailles, by means of its note of May 5th, 1919, the Swiss Federal Council, whilst declaring that it did not agree to the suppression of the free zones, showed itself ready to regulate in a manner more appropriate to present economic conditions the terms of the exchange of goods between the regions concerned; as it is in this connection that the Swiss Government, in Articles 4 to 8 of its draft and in the annex, proposes, subject to certain limitations and reservations, to grant to the natural and manufactured products of the free zones freedom from import duty into Switzerland; as, practically speaking, it is therefore in this domain that a settlement may be sought which, without disregarding the rights of the two Parties, would bring the zones régime more into harmony with present conditions;

Whereas Article 2, paragraph 2, of the Special Agreement contains the following:

"Should the judgment contemplate the import of goods free or at reduced rates through the Federal Customs barrier or through the French Customs barrier, regulations for such importation shall only be made with the consent of the two Parties";

Whereas this clause clearly contemplated the consent of both Parties and not only the consent of the Party across whose customs line importation free of duty or at reduced rates is to take place; as in the presence of a provision perfectly clear in this respect, the Court can only apply such provision as it stands, even if the results following therefrom may in some particular hypothesis seem unsatisfactory;

Whereas, on the other hand, the clause above quoted does not clearly show whether the consent of the Parties is to be

COUR PERMANENTE DE JUSTICE INTERNATIONALE

SÉRIE A/B

ARRÊTS, ORDONNANCES ET AVIS CONSULTATIFS

FASCICULE N° 46

AFFAIRE DES ZONES FRANCHES DE LA HAUTE-SAVOIE ET DU PAYS DE GEX

ARRÊT DU 7 JUIN 1932

XXVme SESSION

1932

XXVth SESSION

JUDGMENT OF JUNE 7th, 1932

PERMANENT COURT OF INTERNATIONAL JUSTICE

SERIES A./B.

JUDGMENTS, ORDERS AND ADVISORY OPINIONS

FASCICULE No. 46

CASE OF THE FREE ZONES OF UPPER SAVOY AND THE DISTRICT OF GEX

LEYDE
SOCIÉTÉ D'ÉDITIONS
A. W. SIJTHOFF

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disputed by Switzerland. On the other hand, Switzerland disputes the right of France to collect duties and taxes at her political frontier even though these charges are not duties and taxes on the importation or exportation of goods but are duties and taxes also levied on the same articles produced or manufactured in France. Switzerland, in fact, has in her draft decision (Art. 3, para. 2) proposed that imports from Switzerland to the free zones shall be free of any duties and taxes whatsoever, a suggestion which has met with lively opposition on the part of France.

In this connection, the Court observes that no such limitation necessarily ensues from the old provisions relating to the free zones; that in case of doubt a limitation of sovereignty must be construed restrictively; and that while it is certain that France cannot rely on her own legislation to limit the scope of her international obligations, it is equally certain that French fiscal legislation applies in the territory of the free zones as in any other part of French territory.

The legitimacy of the imposition of fiscal taxes within the zones as apart from customs duties at the frontier, is shown by Article 4 of the Manifesto of the Royal Sardinian Court of Accounts of September 9th, 1829, relating to the zone of Saint-Gingolph:

> "The laws at present in force in the said communes included in the new zone relating to excise and other duties (*gabelles*)—with the sole exception of the laws concerning the customs—shall continue to be observed as heretofore."

A reservation must be made as regards the case of abuses of a right, since it is certain that France must not evade the obligation to maintain the zones by erecting a customs barrier under the guise of a control cordon. But an abuse cannot be presumed by the Court.

The tax to which the Swiss Agent had drawn the particular attention of the Court is the tax on importation, a form of the turnover tax which is levied at the frontier on goods imported as the result of a contract. It is impossible at present to say whether this tax, which was instituted by the French law of June 25th, 1920, is now levied at the

frontier as a customs duty or as a fiscal tax, or whether the French Government would claim to continue to levy it at the frontier if the customs line were withdrawn. However that may be, the Court neither desires nor is able to consider whether the collection at the political frontier of any particular French tax is or is not contrary to France's obligations. It feels it must confine itself to stating that, in principle, a tax levied solely by reason of importation or exportation across the frontier must be regarded as a tax in the nature of a customs duty and consequently as subject to the regulations relating thereto.

*

If, therefore, considerations connected with its own jurisdiction and with the respect due to the sovereignty of France over the free zones prevent the Court from entertaining certain requests made on behalf of the Swiss Government, similar considerations compel the Court to refrain from entertaining the suggestion which has been made on behalf of the French Government that, in order to get over the difficulty created by Article 2, paragraph 2, of the Special Agreement, the Court should include in its judgment a provision for the withdrawal of the Swiss customs line from the frontier to the further side of the Canton of Geneva and of the commune of Saint-Gingolph. Any such decision, even if it commended itself to the Court, on its merits, would be beyond the Court's jurisdiction. The agreement which was to be concluded between France and Switzerland under Article 435, paragraph 2, of the Treaty of Versailles was for the purpose of settling the status of "these territories", i.e. the free zones, and though it may well have been intended that the Agreement should include such matters as the permeability of the Swiss customs line, it cannot be construed as covering the withdrawal of that customs line from the frontier.

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The withdrawal of the French customs line from the political frontier in the areas constituting the free zones of the Gex District and Upper Savoy, coupled with the inability of the Court to include in its judgment any provisions as to the

SEPARATE OPINION BY M. ANZILOTTI.

[*Translation.*]

I regret that I am unable to agree with the way in which the judgment views the relation between the two sources of jurisdiction relied upon by the applicant Party. This question is so important and its bearing is so wide that I find myself obliged to explain the reasons for my dissent.

1.—The facts of the situation giving rise to this question are briefly as follows.

On July 29th, 1921, the Bulgarian Government signed a Declaration adhering to the Optional Clause concerning the compulsory jurisdiction of the Permanent Court of International Justice in the following terms:

> "On behalf of the Government of the Kingdom of Bulgaria I recognize, in relation to any other Member or State which accepts the same obligation, the jurisdiction of the Court as compulsory *ipso facto* and without any special convention, unconditionally."

This Declaration was ratified on August 12th of the same year.

The Belgian Government signed its Declaration accepting the compulsory jurisdiction of the Court on September 25th, 1925. This Declaration is as follows:

> "On behalf of the Belgian Government, I recognize as compulsory, *ipso facto* and without special agreement, in relation to any other Member or State accepting the same obligations, the jurisdiction of the Court in conformity with Article 36, paragraph 2, of the Statute of the Court for a period of fifteen years, in any dispute arising after the ratification of the present Declaration with regard to situations or facts subsequent to this ratification, except in cases where the Parties have agreed or shall agree to have recourse to another method of pacific settlement."

The ratification was deposited on March 10th, 1926.

Article 36 of the Court's Statute to which the two Declarations refer is as follows:

> "The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in treaties and conventions in force.
>
> The Members of the League of Nations and the States mentioned in the Annex to the Covenant may, either when signing

given until the adopted decision can no longer be altered, at any rate so far as concerns the matters capable of leading to an international dispute. A decision which can be amended, cancelled, or replaced by another is not the decision contemplated by the Parties, whatever colour may be given to it by the municipal law of the country in which it was issued.

It is agreed that, under Bulgarian law as under the law of several other countries, for as long as there is the possibility of an appeal to the Court of Cassation or as long as such appeal is pending, a judgment by an appeal court is one that can be cancelled and replaced by another judgment which, in fact as well as in law, may be absolutely different. Should the Court of Cassation quash the judgment appealed against, the whole case reverts absolutely to the condition in which it stood immediately after the judgment by the lower court; a new case on appeal is heard, involving a re-examination of the facts and of the law, ending in a judgment that may be altogether different from the previous one.

In view of these circumstances, I really do not see what importance can be ascribed, either to the exceptional character given by Bulgarian and other law to the appeal to a court of cassation, for reasons and from considerations which have nothing to do with the question before us; or to the fact that, for similar considerations, the sentence by the Court of Appeal is described as final or given by the last instance; or again, to the fact that the Court of Cassation pronounces only upon questions of law, etc., etc. The one important point is that the judgment by the Court of Appeal, from which appeal is lodged with the Court of Cassation, is a judgment which may be cancelled and replaced by another quite different judgment; that is exactly the contrary of what the Parties desired when they required a "decision with final effect".

(*b*) The second argument, namely, that the denunciation of the Treaty by the Bulgarian Government released the Belgian Government from the duty of awaiting the result of the recourse to cassation, is based mainly upon the consideration that, since the Treaty was about to expire, it became impossible to submit the Application.

This argument seems to me no better founded than the first argument. If the Bulgarian Government had the right to denounce the Treaty, it was perfectly natural that the Belgian Government should be rendered incapable of benefiting by it. It is impossible to describe as *force majeure* what was really only a consequence of the exercise by the Bulgarian Government of its right of denunciation.

True, the representatives of the Belgian Government alluded cautiously to an abuse of right said to have been committed

by the Bulgarian Government when it denounced the Treaty in order to remove from the jurisdiction of this Court the case which the Belgian Government was proposing to submit.

The theory of abuse of right is an extremely delicate one, and I should hesitate long before applying it to such a question as the compulsory jurisdiction of the Court. The old rule, a rule in such complete harmony with the spirit of international law, *Qui iure suo utitur neminem lædit*, would seem peculiarly applicable. The Bulgarian Government was entitled to denounce the Treaty and was sole judge of the expediency or necessity of doing so.

The situation might be somewhat different if the Bulgarian Government, being free to denounce the Treaty at any time, had chosen the particular moment at which it had been informed of the Belgian Government's intention to apply to the Court. But that is not the case. At the time when it learnt of the Belgian Government's decision, the Bulgarian Government had only a few days in which to denounce the Treaty under Article 37, Nos. 2 and 3, if it did not wish to be bound for a further period of five years.

Finally, the Treaty once expired, the Belgian Government was still able to apply to the Court under the Declarations. And the Belgian Government, by basing its application not only on the Treaty but also on the Declarations, showed its belief that those Declarations empower the Court to adjudicate on the present question. There was therefore no *periculum in mora*.

(*c*) There remains only the argument that the local redress rule, being of a suspensory character, can no longer be invoked now that the Court of Cassation has delivered its judgment.

I do not deny that the so-called local redress rule, when invoked by one of the parties to a case, may on occasions simply serve to suspend proceedings; this will probably be the case if the rule is invoked as an objection to the merits.

But in this case, the Court is not confronted with a rule of common international law; it is dealing with a specific and formal provision, Article 3 of the Treaty, which it is required to apply. And this Article grants to the interested Party the right to "object to the matter in dispute being submitted" to the Court. It is therefore absolutely certain that we are concerned with a condition governing application to the Court and that the condition has to be fulfilled at the time when the Court is applied to.

The objection by the Bulgarian Government is therefore well-founded in respect of the first claim of the Application.

INDIVIDUAL OPINION BY M. AZEVEDO.

[*Translation.*]

1.—I agree with the findings of the Court, and the purpose of the following remarks is merely to explain certain reasons which I should like to add to the opinion.

I would begin by referring to my previous view, that I am convinced that a radical change was made by the Charter in the matter of advisory opinions. I also have in mind the revision of Article 82 and the abolition of Article 83 of the Rules of Court, to prevent any request disguised as an opinion.

If the function of advisor given to a Court of Justice offends certain deep-rooted convictions, there is something even stranger in my view ; it is the *tertium genus* which has always impeded the clear application of the rule laid down in Article 14 of the 1919 Covenant, as may be seen by reading the commentaries of those who studied the problem (Bassett Moore, Hudson, De Visscher, Negulesco, Ténékidès, Dauvergne, Beuve-Méry, Remlinger, etc.).

The expressions "any dispute or any point" have given rise to the anomaly of settling a dispute without having the authority of a judgment and sometimes without the consent of the interested parties ; in this way, the principle of voluntary jurisdiction, which was at the basis of the system, ran the risk of disappearing as the result of a diversion which was easy to undertake.

In order to forestall such consequences, the Charter substituted for these expressions simply the terms "any legal question" (in English no change was necessary, because the word *question* already corresponded with the French *point*).

In my view, this strange notion which has been called "advisory arbitration" has now disappeared, as well as the participation of judges *ad hoc* in advisory opinions. The disturbing element having been removed, the advisory function of the Court will assume great importance, and the Court will not have to settle genuine disputes by a strange and indirect method, a sort of travesty of contentious procedure.

Grant Gilmore, in emphasizing the reduction of jurisdiction brought about by the Charter, has observed that the contentious cases decided by the old Court, being more or less linked to the consent of the parties, generally had only secondary importance, while those matters which were decided by advisory opinion were

much more interesting. (*Yale Law Journal*, August 1946. *The International Court of Justice*, pp. 1053, 1054 and 1064.)

That a Court should be asked for an opinion on theoretical questions may seem strange. But it must not be forgotten that the International Court of Justice has a double character: that of tribunal, and that of counsellor. And it is quite fitting for an advisory body to give an answer *in abstracto* which may eventually be applied to several *de facto* situations: *minima circumstantia facti magnam diversitatem juris.*

It is true that Manley Hudson made the point that the Permanent Court never deviated from the facts (*The Permanent Court of International Justice*, 1933, para. 470, pp. 495-496, and note 69), but he admits too that in Advisory Opinion No. 1 the question had already been decided by the International Labour Office, and that the request for the opinion had as its sole purpose the establishment of a criterion for the future (Hudson, *op. cit.*, p. 497, P.C.I.J., Series B., No. 1, p. 14).

Any request—apart from a quite artificial attitude, which cannot be presumed—always arises from or is influenced by facts, but it is also possible to eliminate the concrete elements, so as to reveal an isolated point of doctrine.

In the original report by Lapradelle, in 1920, an abstract request was already contemplated in connexion with the distinction between a "point", on the one hand, which was always limited to a question of pure, theoretical law, and, on the other hand, a "dispute", which had arisen from a concrete disagreement, already in existence.

Such a distinction therefore corresponds to the idea held by the founders of the Court, and it was clearly indicated in the plan proposed in 1920 by the Brazilian jurist Clovis Bevilacqua. It is for all these reasons that the Permanent Court could say:

> "There seems to be no reason why States should not be able to ask the Court to give an abstract interpretation of a treaty; rather would it appear that this is one of the most important functions which it can fulfil." (P.C.I.J., Series A., No. 7, pp. 18-19; Series B., No. 1, p. 24.)

It is even preferable that the Court should ignore disputes that have given rise to any particular question. The Court would not then be led to incur responsibility by departing from its normal duty; the Court would thus leave a wider field of appreciation open to the body which would have to apply the convention without slighting the prestige of the tribunal.

2.—I am glad to note that the first opinion for which the Court is asked affords a perfect example of the manner in which I would

wish questions always to be put. The Court has not even had above all to "consider whether the request for the advisory opinion relates to a legal question actually pending between two or more States", as required by Article 82 of the Rules.

It is true that one of the recitals at the head of the resolution adopted by the General Assembly refers in precise terms to what happened in certain meetings of the Security Council, but if the questions asked are clear enough to make a complete answer possible, the Court is not bound by mere recitals.

On the other hand, if the Court chose to know the facts, it would not be limited, and would be free to inform itself not partially, but completely. That is why the Secretary-General did not send to the Court only the minutes of the three meetings referred to, but sent copious documentation, which the Assistant Secretary-General in charge of the Legal Department used in his oral statement.

Thus, the examination of these documents, as of all other elements which we have been able to examine for the purpose of investigation, convinces us even further that we should make a purely theoretical study of the question, so as to enable the Court without the assistance of any individual or State, to give an opinion of which the effects would be applicable to all Members of the Organization.

In fact, it can be seen, by examining the whole history of the Security Council and of the General Assembly, since the United Nations was founded two years ago, that almost the same arguments have been used and the same criticism reproduced alternatively by the representatives of certain States who found themselves, by the force of circumstances, in similar, though opposite, situations.

The discussion which began in the Security Council at the end of August 1946 might even be compared to that which had already taken place in the same body in January 1946; this made it possible for John Hazard to write about the idea of bargaining in the admission of Members even before the question really came up in the United Nations. (*Yale Law Journal, cit.*, p. 1031.)

3.—By applying an objective criterion faithfully, any legal question can be examined without considering the political elements which may, in some proportion, be involved.

Objection to the political aspect of a case is familiar to domestic tribunals in cases arising from the discretionary action of governments, but the Courts always have a sure means of rejecting the *non liquet* and of acting in the penumbra which separates the legal and the political, in the endeavour to protect individual rights.

In my country, an eminent jurist who was also a member of this Court, Ruy Barbosa, examined the problem fully in the light of comparative law (*Direito do Amazonas ao Acre*, Rio de Janeiro, 1910) ; it is particularly interesting to see in his work how, for instance, the history of the Washington Court from the beginning of the country's autonomous existence, through the war of Secession, until 1937, and the adoption of the *New Deal* by Franklin Roosevelt, affords useful information.

The decisions known as the "Insular Cases" have been ably commented on. C. F. Randolph, for instance, states that "these may be momentous political questions without the precincts of the Court ; within, they are simple judicial questions" (*The Law and Polices of Annexation*, p. 105.)

But the possibility of a separation of the two aspects is still admitted in other countries, whose juridical systems are quite different from those of America. In this connexion, the activity of the French Council of State might be mentioned ; its jurisprudence embraces a constantly widening field.

If we move into the field of international law, we observe that, outside the general wishes expressed in the Preamble, the Charter of the United Nations reminds us that the adjustment or settlement of international disputes or situations which might lead to a breach of the peace is to be brought about by peaceful means, and in conformity with the principles of justice and international law (Article 1, para. 1).

The good faith in which the obligations assumed in accordance with the Charter shall be fulfilled is also mentioned (Article 2, para. 2), as well as the duty of the Security Council to act in accordance with the purposes and principles of the United Nations (Article 24, para. 2).

Consequently, it cannot be denied that the United Nations rests essentially on legal foundations ; the sovereign equality of States is restricted, in order to promote harmony among peoples (P.C.I.J., Series B., No. 13, p. 22), and it must be admitted that all nations, large or small, have had to limit their international activities.

The most typically political acts, such as the declaration of war, are subject to ingeniously linked "abortive" measures ; on the other hand, the power to conclude treaties is regulated (Article 103).

In such conditions, the discretionary powers which are expressly granted, or which can filter through numerous flexible provisions, always come up against limitations and must, in addition, be exercised with a view to the aims of this legal order.

This is why the legal examination of questions can be extended to the frontiers of political action, although (as certain great minds would wish) the abolition of *non-justiciable* disputes has not yet been attained.

In the present case, the legal question is clearly apparent, and the Court can decide it without enquiring whether hidden political motives have been introduced or not, in the same way as the old Court has done in the Opinion No. 23 :

> "The Court .... is called upon to perform a judicial function, and .... there appears to be no room for the discussion and application of political principles or social theories...." (Series B., No. 13, p. 23.)

4.—Passing to the examination of the particular case, and dismissing the notion of the universality of the United Nations, an ideal which has not yet become a guiding rule for the admission of new Members, the following question must first be considered : whether there exists, or not, a subjective right to be admitted to this international society.

In favour of an affirmative answer, it has been suggested that the notion of an obligation in favour of third parties should be applied by analogy ; such a notion has been adopted in several treaties, and also by various international groups, such as the Industrial Property Group, to which each country is free to adhere, such adherence being sufficient for the country to begin to enjoy its rights and assume its obligations.

But here the act involved is not unilateral, but manifestly bilateral ; and it is complete only when the request for admission has been accepted by the principal organs of the United Nations.

Such a request is binding only on the applicant, and even if it is founded on the existence of the qualifications required by the Charter, the candidate cannot himself judge whether the conditions are fulfilled in conformity with Article 4. This is the task of the Organization, which may, or may not, accept the proposal by a judgment which it alone can render.

Therefore it is not a question of right, but simply of interest, which may, however, be transformed later by the judgment in question.

The conditions for admission, as deliberately laid down, are so broad and flexible that the recommendations and decisions relating thereto necessarily contain a strong arbitrary element.

It would be difficult to say that any one of the required conditions has a purely objective character, and that it could be appraised algebraically ; and despite the place allotted to the word "judgment", it is precisely in the matter of the peace-loving nature of

a State that a wide scope has been given to the political views of those who are called upon to pronounce themselves.

Motives of all kinds, tending to unite or separate men and countries, will slip through the remaining loopholes ; all kinds of prejudices, and even physical repugnance will find a way of influencing the decision, either by an act of the will or even through the action of the subconscious. Each appraisal will be psychologically determined according to the criterion applied by each voter.

It would be vain to require in practice that the representatives of States should act exclusively according to ideal and abstract considerations, seeing that at the basis of every social organization, there are only men, whose virtues and faults, individually or collectively, are almost the same.

The philosophical quarrel of the "universals" has not succeeded, through the centuries, in giving any other basis to human groups, in spite of the effect of nominalist, realist and conceptualist doctrines on legal personality, or on the institutional organism.

In short, all political considerations may intervene in determining the judgment of the organs of the United Nations regarding the qualifications laid down in Article 4 of the Charter. Hence, objections that have been raised regarding the protection of the rights of man, the attitude of countries during the last war, the extent of diplomatic relations, etc., may, in principle, justify the rejection of an application.

The idea arose in the San Francisco Conference itself, which approved, by acclamation, a proposal that countries whose governments had been established with the aid of the military force of countries that had fought against the United Nations, should be held not to fulfil the required conditions.

A direct reference to democratic institutions was avoided, roughly in the terms adopted at the Teheran Conference of 1943 (Goodrich and Hambro, *Charter of the United Nations*, p. 80), in order not to intervene in or even meddle with the domestic affairs of a country ; but the report itself, which expressed such fears, did not fail to stress that such an appraisal might be made when judgment as to the required qualifications was given. (U.N.C.I.O., Committee I/2, Doc. 1160, Vol. VII, p. 316.)

5.—On the other hand, it must be admitted that the examination of candidatures has been limited by determining all the requirements that a candidate was obliged to fulfil ; this was the *minimum* considered necessary to prevent arbitrary acts.

Consequently, the draft adopted differs essentially from that of the League of Nations, wherein no qualifications were required,

nor was previous enquiry made into the candidate's past. The candidate was merely invited to enter into an engagement for the future by giving ("provided that") effective guarantees of its sincere intention to observe its international obligations. A more restrictive and less discretionary régime was better suited to the rule of law which the world was desirous of re-establishing after the Moscow declaration of the Four Powers in 1943, and after the Atlantic Charter.

If we look at their method of construction, we shall find that the builders of the San Francisco Charter, in order to avoid increasing the number of articles, decided to provide for express faculties in certain cases; thus, exceptions were made in regard to the important questions subject to a two-thirds majority (Charter, Article 18, para. 3), to territories to be brought under the trusteeship system (Article 77, para. 2), to non-member States which may become parties to the Statute (Article 93, para. 2), and to decisions *ex æquo et bono* (Statute, Article 38, para. 2).

But Article 4 forms no exception to conditions definitely laid down; as regards the absence of the word "condition" in the English text, this does not change the system, if it be remembered that, on several occasions, the same word, taken in the same sense, corresponds in English sometimes to *condition* (Charter, Article 93, and Statute, Article 4, paras. 2 and 3, and Articles 18 and 35), and sometimes to *qualification* (Statute, Articles 2 and 9).

The examination of all the documents leads to the conclusion that exhaustive interpretation has been current in the practice of the organs of the United Nations, the Members of which have reciprocally made complaints on the subject of requirements lying outside the scope fixed by Article 4. It has never been asserted that a country fulfilling all the legal conditions might nevertheless not be admitted, because other conditions were not fulfilled; on the other hand, it has always been stated that the absence of such qualifications prevented the fulfilment of the conditions prescribed by a provision that it was desired not to infringe.

And if I were not faced with an abstract question, and, consequently, if I had to take facts into account, I should consider that allegations which might be the basis of the first question asked have not been proved.

6.—Having established that the required conditions are fixed, it might still be possible—having regard to the doctrine of the relativity of rights already accepted in international law (P.C.I.J., Series A., No. 7, p. 30; and No. 24, p. 2; Series A./B., No. 46, p. 167)—to admit a kind of censorship for all cases in which there has been a misuse or, at any rate, abnormal use of power in the

appreciation of the exhaustive list of qualities—even granting a wide scope to political considerations.

Any legal system involves limitations and is founded on definite rules which are always ready to reappear as the constant element of the construction, whenever the field of action of discretionary principles, adopted in exceptional circumstances, is overstepped.

This is a long-established principle, and has served, during centuries, to limit the scope of the principle *qui suo jure utitur neminem laedit.*

The concept of the misuse of rights has now been freed from the classical notions of *dolus* and *culpa;* in the last stage of the problem an enquiry into intention may be discarded, and attention may be given solely to the objective aspect; i.e., it may be presumed that the right in question must be exercised in accordance with standards of what is normal, having in view the social purpose of the law. (*Cf.* Swiss Civil Code, Art. 2; Soviet, Art. 1; and Brazilian, Art. 160.)

There are even restrictions on arbitrary decision. It would, no doubt, be difficult to fix limits *a priori*, though examples might easily be given; e.g., could Switzerland be regarded as a non-peace-loving country? Could policy override the law to such an extent?

In another field, it might also be asked how the United Nations could continue to function if the reservation in the Charter regarding domestic jurisdiction was subject to no control.

But here there would be no need to seek for reasons; for the Court has before it a theoretical opinion. In any case, it would be a very difficult task to perform, because the Members voting are not bound to state their reasons.

Of course, if they choose to express their motives, they themselves would open the way to the examination of the restrictions, by transforming an abstract act into a causal act (as sometimes happens in private law in the case of certain forms of bonds), in such a way that an enquiry would be possible into the existence and authenticity of a particular cause. The *falsa demonstratio* may thus vitiate the act when it is subordinated to a certain motive.

It is true that it has been maintained that the statement of reasons is not merely an act of courtesy, but the fulfilment of a duty which enables the Assembly to know the reasons for a refusal. But if the great majority of the Members of the United Nations hold that the Security Council's recommendation is a condition *sine qua non* for the admission of a Member by the Assembly, it would be useless for the latter to verify the reasons

that the Council might have had for not reporting favourably on the application.

7.—The request for an opinion is not confined to a general point. It also contains a particular question, namely, the hypothetical case in which an affirmative vote is made subject to simultaneous admission of other States. Such an attitude has been alleged directly or indirectly, clearly or in a disguised manner, on several occasions.

But there is no question of a simple example or corollary, which would make a special reply superfluous; on the contrary, the second question is, from its nature, not wholly included in the first. There is a change of plane from the individual to the collective, and this is not legally justified, if arbitrary action is excluded; there is a change from the consideration of the qualities inherent in a certain candidate, to circumstances foreign to that candidate and concerned with the interests of third parties.

Once it is admitted that a State has proved that it has all the required qualifications, a refusal to accept its application might be considered tantamount to a violation, not only of an interest, but of a right already established, the acceptance of the State having been recognized, by final judgment, to be fully justified.

The most weighty reasons, such as the validity of a prior international undertaking, even if that undertaking bound all the Members of the United Nations, could not, in any case, justify the abandonment of a rule of law as an act of retortion. It would, in law, be equally abnormal to refuse admission in order to avoid acting unjustly towards a third party, or to defend oneself against action considered to be arbitrary, as it would be to demand compensatory advantages from a candidate.

8.—Having completely covered the question in its true limits, a judge will have fulfilled his duty if he gives a legal answer as to the law, independent of facts and without commenting on the attitude of any particular State (P.C.I.J., Series B., No. 13, p. 24).

If he does so, he will not hinder the political activity of the organs that are responsible for the maintenance of peace; for elements of expediency, manifest or hidden, can always be considered when reasonable use is made of the wide possibilities opened by Article 4 of the Charter. Respect for law must never constitute a reason for disturbing international harmony, nor cause an upheaval in the life of any society.

(*Signed*) PHILADELPHO AZEVEDO.

DISSENTING OPINION OF JUDGE KLAESTAD

I consider that the case should have been adjourned for the following reasons:

The present Judgment deals with one of the three pleas in bar which, in this second phase of the proceedings, have been invoked by the Government of Guatemala. This plea in bar by that Government is based on the ground that the naturalization granted to Mr. Nottebohm by Liechtenstein is invalid because it is inconsistent with the national law of Liechtenstein as well as with international law.

I. As to the national law of Liechtenstein, it is argued that the authorities of that State, in applying their Nationality Law of 4th January, 1934, have not observed its provisions, but in various respects departed therefrom, particularly with regard to the prescribed order in which Government, Diet and Commune were to deal with the application for naturalization. On this ground, the Court is invited to declare that Mr. Nottebohm has not properly acquired Liechtenstein nationality in accordance with the law of the Principality.

It is generally recognized that questions of naturalization of aliens are, in the absence of conventional rules, in principle within the exclusive competence of States, and that international law has left it to the States themselves to regulate in what manner and under what conditions their nationality may be conferred upon aliens. But if a State has in principle the exclusive competence to regulate questions of nationality by its own legislation without interference by other States, it is difficult to see on what ground its own interpretation and application of this same legislation could be open to challenge by other States. Such a challenge is possible in theory on the ground that the legislation or the application thereof is inconsistent with international law; but the question now under consideration is only whether the authorities of Liechtenstein have applied their local law in a manner consistent with the provisions of that local law.

The Permanent Court of International Justice has on several occasions considered what attitude the Court should take with regard to the national law of States, such as in Judgments No. 7 concerning *German interests in Polish Upper Silesia* and Nos. 14 and 15 in the *Serbian and Brazilian Loans Cases*. In accordance with the view expressed in those Judgments, it may be said that it would not be in conformity with the function for which the

Court is established if it proceeded to examine and decide whether the competent authorities of Liechtenstein have applied the various provisions of their Nationality Law of 1934 in a correct manner. The Court is not deemed to know the national law of the different States. It would hardly be possible for it to place its own construction upon the provisions of the Liechtenstein Nationality Law and to disregard the interpretation and application made by the competent local authorities. By so doing, the Court would substitute itself for these local authorities and pronounce upon matters which have no bearing on international law, and which therefore are solely within the competence of these authorities.

What the Court, in my opinion, can and must do with regard to the application of the Liechtenstein Nationality Law, is to ascertain whether the naturalization in question was in fact granted by the authority to which that law has attributed this competence. Article 12 prescribes that it is the Reigning Prince who alone is entitled to grant the nationality of the Principality. On the evidence submitted to the Court, I am satisfied that the Prince did in fact give his consent to the naturalization of Mr. Nottebohm.

II. The Government of Guatemala further contends that the naturalization was not granted in accordance with international law. It invokes the fact that Mr. Nottebohm had not established his residence in Liechtenstein before he applied for naturalization, and that he left the country soon after it was granted. Apart from conventional rules, international law does not, however, require previous residence in the country as a condition for naturalization, nor does it presuppose a subsequent residence there. This is shown by the fact that the national laws of a great number of States have—though generally providing for previous residence in the country—allowed dispensation from that requirement. The national law of Liechtenstein equally requires such previous residence (para. 6 *(d)* of the Nationality Law of 1934) but provides that this requirement may be dispensed with, as in fact it was in the present case. To exercise this discretionary power of dispensation is a matter solely within the competence of the Government of Liechtenstein.

The validity of the naturalization of Mr. Nottebohm is also contested on the ground that the Government of Liechtenstein has not proved the loss of his German nationality, as required by paragraph 6 *(c)* of the same Law of 1934. But this requirement also may be dispensed with according to that provision. It appears, however, that such dispensation was considered unnecessary in view of the provisions of Article 25 of the German Nationality Law of 1913, according to which he would lose his German nationality by acquiring the nationality of Liechtenstein. That he there-

by in fact lost his German nationality was, on 15th June, 1954, certified by the Senate of Hamburg.

III. The view has been expressed that the relationship established between State and individual by naturalization must presuppose the existence of a physical or real link or a substantial connection attaching the individual to the State. It is thereby implied that a mere common and effective will, not vitiated by fraud, is not sufficient for the creation of the relationship of nationality. It may be questioned whether this view is a true expression of a binding rule of international law.

When the Court, in the *Asylum* case, was confronted with a contention relating to an alleged right of a unilateral and definitive qualification of the offence committed by the refugee, it based itself on the principle of State sovereignty and held that a party which relies on a custom derogating from that principle must prove that the rule invoked is in accordance with a constant and uniform State practice accepted as law. The same method would seem to be applicable in the present case. Having to base oneself on the ground that questions of naturalization are in principle within the exclusive competence of States, one should, as in the *Asylum* case, enquire whether a rule derogating from that principle is established in such a manner that it has become binding on Liechtenstein. The Government of Guatemala would have to prove that such a custom is in accordance with a constant and uniform State practice "accepted as law" (Article 38, para. 1 *(b)* of the Court's Statute). But no evidence is produced by that Government purporting to establish the existence of such a custom.

IV. The present Judgment does not decide the question, in dispute between the Parties, whether the naturalization granted to Mr. Nottebohm was valid or invalid either under the national law of Liechtenstein or under international law. Leaving this question open, it decides that the Government of Liechtenstein is not, under international law, entitled to extend its protection to him as against Guatemala.

A solution upon these lines—severance of diplomatic protection from the question of nationality, and restriction of the right of protection—was never invoked by the Government of Guatemala, nor discussed by the Government of Liechtenstein. It does not conform with the argument and evidence which the Parties have submitted to the Court, and the Government of Liechtenstein has had no occasion to define its attitude and prove its eventual contentions with regard to this solution, whereby its claim is now dismissed. In such circumstances, it is difficult to discuss the merits of such a solution except on a theoretical basis; but I shall mention some facts which show how necessary it would have been, in the interest

of a proper administration of justice, to afford to the Parties an opportunity to argue this point before it is decided.

Mr. Nottebohm went to Liechtenstein in 1946 after having been liberated from his internment in the United States of America. It is seen from Annex 5, paragraph 18, and Annex 6, paragraph 20, of the Memorial, and paragraph 106 of the Rejoinder, that he must have arrived in Liechtenstein before May 6th, 1946. He established his residence in that country and has lived there ever since.

The record of this case shows that a number of measures were taken by the Government of Guatemala against property of Mr. Nottebohm at a time when he was permanently residing in Liechtenstein. When expropriation measures were taken against his property by virtue of the Legislative Decree No. 630 of 25th May, 1949, he had been living in Liechtenstein for more than three years.

As the Judgment has not decided that the naturalization granted to Mr. Nottebohm on 13th October, 1939, is invalid under Liechtenstein law, one must, for the purpose of deciding the present plea in bar, assume that it is valid. In such circumstances, it is difficult to see on what legal basis the Government of Liechtenstein could be considered as being debarred from affording diplomatic protection to him in respect of measures taken by the Government of Guatemala against his property at a time when he was a permanent resident in Liechtenstein. His link or connection with that country was at that time of such a character that the reasons relied on in the Judgment should constitute a solid ground for the recognition of the right of the Government of Liechtenstein to extend its protection to him as against Guatemala in respect of all measures taken against his property during his permanent residence in Liechtenstein.

V. It is alleged by the Government of Guatemala that the Government of Liechtenstein, by granting its nationality to a German national at a time when Germany was at war, has committed an abuse of right or a fraud. For the purpose of the present case, it is unnecessary to express any views as to the possible applicability of the notion of abuse of right in international law. All I need say is that it would, if so applicable, in my view presuppose the infliction of some kind of injury upon the legitimate interests of Guatemala by the naturalization of Mr. Nottebohm. But it is not shown that an injury of any kind was thereby inflicted upon Guatemala, which at that time was a neutral State.

As to the contention that fraud was committed by the Government of Liechtenstein, it suffices to say that no evidence has been produced in support of such a contention. The various irregularities

in the naturalization procedure of which the Government of Guatemala has complained, and the financial conditions fixed for the grant of naturalization, cannot be considered as involving a fraud.

VI. The Government of Guatemala has finally contended that fraud was committed by Mr. Nottebohm when he applied for and obtained Liechtenstein nationality. It was argued that he fraudulently sought this naturalization solely for the purpose of escaping from the consequences of his German nationality under the shield of the nationality of a neutral State. As no documentary evidence in support of this contention was produced in the course of the written proceedings, the Agent of Guatemala, after the closure of those proceedings and a few days before the oral hearing, submitted to the Court a considerable number of new documents. The Agent of Liechtenstein having objected to the production of these documents, the Court on February 14th, 1955, decided to permit the production of all these new documents, stating that it :

> "Reserves to the Agent of the Government of Liechtenstein the right, if he so desires, to avail himself of the opportunity provided for in the second paragraph of Article 48 of the Rules of Court, after hearing the contentions of the Agent of the Government of Guatemala based on these documents, and after such lapse of time as the Court may, on his request, deem just."

On the basis of these new documents, Counsel for Guatemala submitted at the oral hearing the new allegation that part of the property of the firm Nottebohm Hermanos of Guatemala, which the Government of Liechtenstein now claims on behalf of Mr. Nottebohm, in reality belonged to the firm Nottebohm & Co. of Hamburg, and that Mr. Nottebohm, by obtaining Liechtenstein nationality, attempted in a fraudulent manner to protect German property from the consequences of the war. Counsel qualified the case as a "cloaking case".

These allegations of fraud, which now appear to constitute the main aspect of this case, affect the plea in bar concerning nationality as well as the merits. In its final Submissions as to the merits, the Government of Liechtenstein requests the Court :

> "(5) to adjourn the oral pleadings for not less than three months in order that the Government of Liechtenstein may obtain and assemble documents in support of comments on the new documents produced by the Government of Guatemala."

A consideration of the merits would render previous compliance with this request necessary. Not only has the Government of Liechtenstein acquired a right, by virtue of Article 48, paragraph 2, of the Rules of Court, to submit documents in support of its comments upon the new documents produced by the Agent of Guatemala, but this right was expressly reserved to the Agent of Liechtenstein by the Court's decision of February 14th. A finding on the plea

in bar concerning nationality (diplomatic protection) presupposes, in my opinion, a consideration of the merits ; it depends, as I have attempted to show, on the question whether Mr. Nottebohm committed a fraud when he applied for and obtained Liechtenstein nationality. This question of fraud is so closely connected with the merits of the case that it cannot be decided apart from them and without any appraisal of the various relevant facts which may be disclosed by a consideration of the merits, including the new documents produced by the Government of Guatemala and the documents which the Government of Liechtenstein has become entitled to produce.

This procedural situation also affects the two other pleas in bar invoked by the Government of Guatemala. The plea as to the alleged necessity of previous diplomatic negotiations could only arise if it were held that Mr. Nottebohm has validly acquired Liechtenstein nationality. Only in that case would the Government of Liechtenstein be qualified to present his claim to the Court. Only then could a relevant question arise as to negotiations between the two Governments concerning the claim. Similar considerations apply to the plea in bar as to the exhaustion of local remedies. If it were held that Mr. Nottebohm has not validly acquired the nationality of Liechtenstein, the question whether he has exhausted remedies in Guatemala could not arise before the Court.

For these reasons I have voted for the adjournment of the case.

(Signed) Helge KLAESTAD.

DISSENTING OPINION OF JUDGE READ

I am unable to concur in the Judgment of the Court, which holds that the claim submitted by the Principality of Liechtenstein is inadmissible. It is, therefore, necessary for me to indicate my conclusions as to the proper disposition of the plea in bar, and to give my reasons. In doing so, I must examine certain of the grounds which were relied on by Counsel, in the Pleadings and during the Oral Proceedings, but which were not adopted as a basis for the Judgment.

At the outset, I consider that the very nature of a plea in bar controls the examination of the issues. The allowance of a plea in bar prevents an examination by the Court of the issues of law and fact which consitute the merits of the case. It would be unjust to refuse to examine a claim on the merits on the basis of findings of law or fact which might be reversed if the merits were considered and dealt with.

Accordingly, it is necessary, at this stage, to proceed upon the assumption that all of Liechtenstein's contentions on the merits, fact and law, are well-founded; and that Guatemala's contentions on the merits may be ill-founded.

There is another aspect of this case which I cannot overlook. Mr. Nottebohm was arrested on October 19th, 1943, by the Guatemalan authorities, who were acting not for reasons of their own but at the instance of the United States Government. He was turned over to the armed forces of the United States on the same day. Three days later he was deported to the United States and interned there for two years and three months. There was no trial or inquiry in either country and he was not given the opportunity of confronting his accusers or defending himself, or giving evidence on his own behalf.

In 1944 a series of fifty-seven legal proceedings was commenced against Mr. Nottebohm, designed to expropriate, without compensation to him, all of his properties, whether movable or immovable. The proceedings involved more than one hundred and seventy one appeals of various kinds. Counsel for Guatemala has demonstrated, in a fair and competent manner, the existence of a network of litigation, which could not be dealt with effectively in the absence of the principally interested party. Further, all of the cases involved, as a central and vital issue, the charge against Mr. Nottebohm of treasonable conduct.

It is common ground that Mr. Nottebohm was not permitted to return to Guatemala. He was thus prevented from assuming the personal direction of the complex network of litigation. He was

allowed no opportunity to give evidence of the charges made against him, or to confront his accusers in open court. In such circumstances I am bound to proceed on the assumption that Liechtenstein might be entitled to a finding of denial of justice, if the case should be considered on the merits.

In view of this situation, I cannot overlook the fact that the allowance of the plea in bar would ensure that justice would not be done on any plane, national or international. I do not think that a plea in bar, which would have such an effect, should be granted, unless the grounds on which it is based are beyond doubt.

With these considerations in mind, it is necessary to examine the single issue that the Court must decide in order to reject or allow the plea in bar based on the ground of nationality. The issue for decision is : *whether, in the circumstances of this case and vis-à-vis Guatemala, Liechtenstein is entitled, under the rules of international law, to afford diplomatic protection to Mr. Nottebohm.*

It is necessary to deal with the different grounds which have been relied on in the Pleadings and in the Oral Proceedings.

* * *

The first ground for holding that the claim is inadmissible, which is contained in paragraph 2 *(a)* of the Final Conclusions of Guatemala, may be stated shortly : that Mr. Nottebohm did not acquire Liechtenstein nationality in accordance with the law of the Principality. While the Judgment of the Court does not rely on this ground, I must state my position, in order to justify my conclusion that the plea in bar as a whole should be joined to the merits.

Here, the production of the certificate of naturalization, and the adoption of the claim by Liechtenstein, establish a *prima facie* case. The Court can go back of the certificate and disregard it on proof of fraud in the application for or grant of the naturalization, or in the obtaining or issuing of the certificate. But there has been no such proof.

It has been argued that the Court can and should examine the Liechtenstein law and the procedure followed by the Liechtenstein authorities when the naturalization was granted. It has been contended that they did not comply with the law and that, as a result of their defaults, the naturalization granted was a nullity.

I have reached the conclusion that the claim cannot be rejected on the ground of non-compliance with the national law, and shall give my reasons in summary form.

To begin with, it is necessary to take into account the jurisprudence of the Permanent Court. Two principles of law have been established. The judgment in *The Mavrommatis Jerusalem Con-*

cessions—Series A, No. 5, at page 30—settled the rule that the burden of proof is on the party, that alleges the nullity of a legal act under the national law, to prove it.

The other principle is to be found in a long series of decisions, which applied the principle : that "municipal laws are merely facts which express the will and constitute the activities of States" and that the Court does not interpret the national law as such.

Polish Upper Silesia—Series A, No. 7, page 19.
Serbian Loans—Series A, Nos. 20/21, page 46.
Brazilian Loans—Series A, Nos. 20/21, page 124.
Lighthouses Case (France/Greece)—Series A/B, No. 62, page 22.
Panevezys-Saldutiskis Railway Case—Series A/B, No. 76, page 19.

In the present case, Guatemala has alleged the invalidity or nullity of the legal act of naturalization under the national law. The burden of proof is on Guatemala to prove it. But Guatemala has not furnished any admissible evidence ; such as the testimony of a jurist learned and experienced in Liechtenstein law, or an opinion from the Highest Court in that country. The case has been presented as if this Court was competent to interpret the Liechtenstein law as such, and to pass upon its application to the special circumstances of this case. It has been argued without consideration of the provisions of the Liechtenstein law regarding the interpretation of statutes or of the decisions of its courts.

Accordingly, the contention of the respondent Government, as regards invalidity under the national law, fails through lack of evidence to support it.

But this is not merely a case of failure of proof. Even if the Liechtenstein Law of 1934 is interpreted without regard to the rules of interpretation, procedure and administrative law in force in that country, it is impossible to reach the conclusion that the naturalization was a nullity. There is a fundamental error in the method of interpretation adopted by Counsel, both in the Pleadings and in the Oral Proceedings.

It has been argued that the Liechtenstein authorities disregarded the provisions of the Law of 1934 in two respects : it is said that they inverted the order in which the different steps in the procedure were to be carried out. It is also said that they did not comply with certain essential requirements laid down in the Law. The conclusion was reached that the naturalization was invalid, because of non-conformity with the laws of the Principality.

This interpretation was based on consideration of particular provisions, without taking into account the Law as a whole. In particular, it ignored a provision which is of crucial importance, Article 21, which contains the following paragraph :

Section 21

"The Princely Government may, within five years from the date of acquisition thereof, deprive a foreign national of the citizenship of the Principality which has been granted to him, if it appears that the requirements laid down in this law as governing the grant thereof were not satisfied. It is entitled, however, at any time, to deprive a person of the citizenship of the Principality if the acquisition thereof has come about in a fraudulent manner."

It is clear that the naturalization of Mr. Nottebohm could have been revoked at any time within five years of the grant, if it had appeared that any of "the requirements laid down in this law were not satisfied". It is equally clear that, after the expiration of the five-year period—i.e. in October 1944—the naturalization became indefeasible, apart from fraud. In such circumstances, it is not open to me, nearly sixteen years after the event and in the absence of fraud, to find that the naturalization was invalid under the Liechtenstein law.

* * *

The second ground for holding that the claim is inadmissible, which is contained in paragraph 2 *(b)* of the Final Conclusions of Guatemala, may be stated shortly: that naturalization was not granted to Mr. Nottebohm in accordance with the generally recognized principles in regard to nationality.

Conclusion 2 *(b)* is obviously defective. The Court cannot determine "generally recognized principles" or decide cases on the basis of such principles. Its competence is limited by the peremptory and mandatory provisions of Article 38 of the Statute, to decision "in accordance with international law".

However, the position taken by Counsel makes it clear that the Final Conclusion 2 *(b)* was intended to raise the issue of abuse of right.

Abuse of right is based on the assumption that there is a right to be abused. In the present case it is based upon the assumption that Liechtenstein had the right under international law to naturalize Mr. Nottebohm, but that, in view of the special circumstances and the manner in which the right was exercised, there was an improper exercise of the right—an exercise so outrageous and unconscionable that its result, i.e. the national status conferred on Mr. Nottebohm, could not be invoked against Guatemala.

The doctrine of abuse of right cannot be invoked by one State against another unless the State which is admittedly exercising its rights under international law causes damage to the State invoking the doctrine.

As this ground is not relied upon in the Judgment of the Court, it is unnecessary for me to examine the particular grounds relied

on by Counsel. It is sufficient to point out that Liechtenstein caused no damage to Guatemala, and that it is therefore necessary to reject the Final Conclusion 2 *(b)*.

* * *

The third ground for holding that the claim is inadmissible, which is contained in paragraph 2 *(c)* of the Final Conclusions of Guatemala, is based on fraud.

It is impossible to separate the aspects of fraud which are relevant to the plea in bar from those which concern the merits. The greater part of the evidence adduced in support of the charge of fraud was contained in considerably more than one hundred documents. From these documents a few were selected and brought to the attention of the Court. The remaining documents were not placed at the disposition of the Court.

In these circumstances, it is not possible for me to found any conclusion based on fraud at this stage in the case. I am therefore of the opinion that the Guatemalan Final Conclusion 2 *(c)* should be joined to the merits.

* * *

There is another aspect of the question, which must be considered. The Judgment of the Court is based upon the ground that the naturalization of Mr. Nottebohm was not a genuine transaction. It is pointed out that it did not lead to any alteration in his manner of life ; and that it was acquired, not for the purpose of obtaining legal recognition of his membership in fact of the population of Liechtenstein, but for the purpose of obtaining neutral status and the diplomatic protection of a neutral State.

This ground, to which I shall refer as the link theory, as it is based on the quality of the relation between Mr. Nottebohm and Liechtenstein, cannot be related to the Final Conclusions of Guatemala, or to the argument in the Pleadings and Oral Proceedings.

Accordingly, the matter is governed by the principle which was applied by this Court in the Ambatielos case (Jurisdiction), Judgment of July 1st, 1952, *I.C.J. Reports 1952*, at page 45 :

> "The point raised here has not yet been fully argued by the Parties, and cannot, therefore, be decided at this stage."

Indirectly, some aspects were discussed as elements of abuse of right, but not as a rule of international law limiting the power of a sovereign State to exercise the right of diplomatic protection in respect of one of its naturalized citizens.

AFFAIRE RELATIVE A
L'USINE DE CHORZÓW
(DEMANDE EN INDEMNITÉ)
(COMPÉTENCE)

PUBLICATIONS OF THE PERMANENT COURT
OF INTERNATIONAL JUSTICE.

SERIES A. — No. 9

July 26th, 1927

COLLECTION OF JUDGMENTS

CASE CONCERNING
THE FACTORY AT CHORZÓW
(CLAIM FOR INDEMNITY)
(JURISDICTION)

COUR PERMANENTE DE JUSTICE INTERNATIONALE

1927.
26 juillet.
1er E. c. XI.
Rôle XII : 3.

DOUZIÈME SESSION (ORDINAIRE)

Présents :

MM. HUBER, *Président*,
LODER, *ancien Président*,
Lord FINLAY,
MM. NYHOLM,
MOORE,
DE BUSTAMANTE,
ALTAMIRA,
ODA,
ANZILOTTI,
PESSÔA, } *Juges*,
M. YOVANOVITCH, *Juge suppléant*,
MM. RABEL,
EHRLICH, } *Juges nationaux*.

ARRÊT N° 8

AFFAIRE RELATIVE A L'USINE DE CHORZÓW

(DEMANDE EN INDEMNITÉ)

(COMPÉTENCE)

Entre le Gouvernement d'Allemagne, représenté par M. le Dr Eric Kaufmann, professeur à Bonn,

Demandeur,

et le Gouvernement de Pologne, représenté par M. le Dr Thadée Sobolewski, agent du Gouvernement polonais auprès du Tribunal arbitral mixte polono-allemand,

Défendeur,

PERMANENT COURT OF INTERNATIONAL JUSTICE.

1927.
July 26th
File E. c.
Docket XI

TWELFTH (ORDINARY) SESSION.

Before:

MM. HUBER, *President*,
LODER, *Former President*,
Lord FINLAY,
MM. NYHOLM,
MOORE,
DE BUSTAMANTE,
ALTAMIRA,
ODA,
ANZILOTTI,
PESSÔA, } *Judges*,
M. YOVANOVITCH, *Deputy-Judge*,
MM. RABEL,
EHRLICH, } *National Judges*.

JUDGMENT No. 8.

CASE CONCERNING THE FACTORY AT CHORZÓW

(CLAIM FOR INDEMNITY)

(JURISDICTION).

The Government of Germany, represented by Dr. Erich Kaufmann, Professor at Bonn,

Applicant,

versus

The Government of the Polish Republic, represented by Dr. Thadeus Sobolewski, Agent for the Polish Government before the Polish-German Mixed Arbitral Tribunal,

Respondent.

ciples upon which this Head is based, as regards procedure, is that no dispossession may be effected without previous notice to the real or apparent owner, affording him an opportunity of being heard before the competent tribunal. It is certain—having regard to the promulgation by the Polish Government of the laws of July 14th, 1920, and of June 16th, 1922, and to the application given to those laws—that in this case such a procedure has not been adopted, for the dispossession of the Companies concerned had, in the Polish Government's contention, taken place outside the framework of the Geneva Convention. Consequently, the Polish Government cannot in this particular case require the interested Parties to look for redress of the injury sustained by them to the tribunals which might have been open to them if the Convention had been applied. For, thereafter, the utmost that the interested Parties could obtain from these tribunals would be reparation for the wrong, whereas, if that procedure had been followed out, the wrong would perhaps never have occurred.

From what has been said, it follows that once dispossession has taken place without previous investigation of the right of ownership, the possible undertaking of this investigation in order to justify such dispossession after it has taken place, cannot undo the fact that a breach of the Geneva Convention has already taken place, or affect the Court's jurisdiction.

It is, moreover, a principle generally accepted in the jurisprudence of international arbitration, as well as by municipal courts, that one Party cannot avail himself of the fact that the other has not fulfilled some obligation or has not had recourse to some means of redress, if the former Party has, by some illegal act, prevented the latter from fulfilling the obligation in question, or from having recourse to the tribunal which would have been open, to him.

If, against what has just been stated by the Court, it were contended that the measures taken by the Polish Government in regard to the Oberschlesische and Bayerische did not constitute expropriation within the meaning of Head III of the Geneva Convention, the Court would be called upon to repeat what it has already had occasion to say not only in Judgment No. 7, but also in the present Judgment, namely, that if expropriation in consideration of an indemnity is prohibited by that Head, *a fortiori* is a seizure, without compensation to the interested Parties, prohibited.

DISSENTING OPINION OF M. ANZILOTTI.

[*Translation.*]

Being unable wholly to concur in the present judgment, and having regard to the importance of the case and of the principles of law involved, I feel it my duty to avail myself of my right under the Court's Statute and to indicate as briefly as possible my standpoint in regard to this dispute.

1.—In the first place, I dissent with regard to the manner in which the question referred to the Court has been approached.

The dispute is one between Denmark and Norway regarding the sovereignty over a territory in Eastern Greenland. Denmark's position in Greenland formed the subject of a request addressed by the Danish Government to the Norwegian Government in July 1919, and of a declaration on the part of the latter Government accepted by the Danish Government. Accordingly, in my view, the first thing to be done was to decide whether this constituted a valid agreement between the two Governments; if so, the rule to be applied for the solution of the dispute should first and foremost have been sought in this agreement.

I am quite aware that this was not the line taken by the Parties, one of whom desired to take advantage of the present proceedings in order to attempt to establish his sovereignty over all Greenland, and, accordingly, had every interest in presenting the request addressed to the Norwegian Government, and other similar overtures, in the light of a preconceived theory, whilst it was to the other's interest to show that the declaration made on his behalf in 1919 was devoid of any importance. That, however, should not have prevented the Court from rectifying the position in accordance with the principles of law and the rules of its own Statute.

I speak only of the Danish request in 1919 and of the declaration made in response thereto because, in my view, that is the only agreement between the two countries—assuming, of course, that there was an agreement—which concerns the question submitted to the Court. As regards the Convention of July 9th, 1924, concerning Eastern Greenland, I hold, with the judgment, that the notes exchanged the same day between the Danish and Norwegian Governments render it impossible to adduce any argument from that Convention in support of the contentions of either Party.

which I do not propose to examine, the Court could not have declared the occupation invalid, if the term "invalid" signifies "null and void". A legal act is only non-existent if it lacks certain elements which are essential to its existence. Such would be the occupation of territory belonging to another State, because the status of a *terra nullius* is an essential factor to enable the occupation to serve as a means of acquiring territorial sovereignty. But this does not hold good in the case of the occupation of a *terra nullius* by a sovereign State in conformity with international law, merely because the occupying State had undertaken not to occupy it. Accordingly, it would have been for the Norwegian Government to revoke the occupation unlawfully carried out, without prejudice to the Danish Government's right to apply to the Court, as reparation for the unlawful act, to place this obligation on record (Judgment No. 13, p. 47).

The Norwegian Government, in its turn, has submitted the following counter-claim :

"that Denmark does not possess sovereignty over Eirik Raudes Land ;

that Norway has acquired sovereignty over Eirik Raudes Land".

In my view, it follows from the whole of the written and oral proceedings that the first paragraph is designed to supply the ground for the second and that, accordingly, there is only one claim the aim of which is to obtain a declaration from the Court that the occupation effected by the Norwegian Government is lawful and valid. This claim should, in my view, be rejected, for an unlawful act cannot serve as the basis of an action at law.

(*Signed*) D. ANZILOTTI.

DISSENTING OPINION OF JUDGE SCHWEBEL

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H. The Nicaraguan Government, despite its denials, in fact has acted as the principal conduit for the provision of arms and munitions to the Salvadoran insurgents from 1979 to the present day ; command and control of the Salvadoran insurgency has been exercised from Nicaraguan territory with the co-operation of the Cuban and Nicaraguan Governments ; training of Salvadoran insurgents has been carried out in Cuba and Nicaragua ; the Salvadoran insurgents' radio station at one time operated from Nicaraguan territory ; and Nicaraguan political and diplomatic support of the Salvadoran insurgency has been ardent, open and sustained 28-188

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J. In November 1981, after Nicaragua had failed to accept repeated United States requests to cease its material support for Salvadoran insurgents, the United States decided to exert military pressure upon Nicaragua in order to force it to do what it would not agree to do 191

K. The object of United States support of the *contras* was claimed by the United States to be interdiction of traffic in arms to El Salvador, though clearly that was not the purpose of the *contras* 192

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Government or affecting its policies – and this despite the fact that Nicaragua's intervention antedates that of the United States. The Court :

> "considers that in international law, if one State, with a view to the coercion of another State, supports and assists armed bands in that State whose purpose is to overthrow the government of that State, that amounts to intervention by the one State in the internal affairs of the other . . .".

The Court applies that faultless conclusion to the United States (despite its legal defences to that conclusion). It holds that the United States has committed "a clear breach of the principle of non-intervention". But the Court fails to apply this principle of international law to Nicaragua, despite the fact that Nicaragua's support of assistance to armed bands in El Salvador is all too obvious (and despite the fact that Nicaragua has no defence, and has offered no defence, for its intervention other than falsely denying its reality). How does the Court justify this remarkable application of the law ? In effect, by adopting the purport of Nicaragua's representations as its own. Thus, whatever the intention of the Court is, the result of its Judgment is that, rather than prejudicing Nicaragua's claims, the calculated, critical misrepresentations of Nicaragua's representatives have served to protect and promote them.

X. Nicaragua's Unclean Hands Require the Court in any Event to Reject its Claims

268. Nicaragua has not come to Court with clean hands. On the contrary, as the aggressor, indirectly responsible – but ultimately responsible – for large numbers of deaths and widespread destruction in El Salvador apparently much exceeding that which Nicaragua has sustained, Nicaragua's hands are odiously unclean. Nicaragua has compounded its sins by misrepresenting them to the Court. Thus both on the grounds of its unlawful armed intervention in El Salvador, and its deliberately seeking to mislead the Court about the facts of that intervention through false testimony of its Ministers, Nicaragua's claims against the United States should fail.

269. As recalled in paragraph 240 of this opinion, the Permanent Court of International Justice applied a variation of the "clean hands" doctrine in the *Diversion of Water from the Meuse* case. The basis for its so doing was affirmed by Judge Anzilotti "in a famous statement which has never been objected to : 'The principle . . . *(inadimplenti non est adimplendum)* is so just, so equitable, so universally recognized that it must be applied in international relations . . .' " (Elisabeth Zoller, *Peacetime Unilateral Remedies : An Analysis of Countermeasures,* 1984, pp.16-17). That principle was developed at length by Judge Hudson. As Judge Hudson observed in

reciting maxims of equity which exercised "great influence in the creative period of the development of Anglo-American law", "Equality is equity", and "He who seeks equity must do equity". A court of equity "refuses relief to a plaintiff whose conduct in regard to the subject-matter of the litigation has been improper" (citing Halsbury's *Laws of England*, 2nd ed., 1934, p. 87). Judge Hudson noted that, "A very similar principle was received into Roman law... The *exceptio non adimpleti contractus*..." He shows that it is the basis of articles of the German Civil Code, and is indeed "a general principle" of law. Judge Hudson was of the view that Belgium could not be ordered to discontinue an activity while the Netherlands was left free to continue a like activity – an enjoinder which should have been found instructive for the current case. He held that, "The Court is asked to decree a kind of specific performance of a reciprocal obligation which the demandant is not performing. It must clearly refuse to do so." (*Loc. cit.*, pp. 77-78. And see the Court's holding, at p. 25.) Equally, in this case Nicaragua asks the Court to decree a kind of specific performance of a reciprocal obligation which it is not performing, and, equally, the Court clearly should have refused to do so.

270. The "clean hands" doctrine finds direct support not only in the *Diversion of Water from the Meuse* case but a measure of support in the holding of the Court in the *Mavrommatis Palestine Concessions* case, *P.C.I.J., Series A, No. 5*, page 50, where the Court held that : "M. Mavrommatis was bound to perform the acts which he actually did perform *in order to preserve his contracts from lapsing as they would otherwise have done.*" (Emphasis supplied.) Still more fundamental support is found in Judge Anzilotti's conclusion in the *Legal Status of Eastern Greenland, P.C.I.J., Series A/B, No. 53*, page 95, that "an unlawful act cannot serve as the basis of an action at law". In their dissenting opinions to the Judgment in *United States Diplomatic and Consular Staff in Tehran, I.C.J. Reports 1980*, pages 53-55, 62-63, Judges Morozov and Tarazi invoked a like principle. (The Court also gave the doctrine a degree of analogous support in the *Factory at Chorzów* case, *P.C.I.J., Series A, No. 9*, p. 31, when it held that "one party cannot avail himself of the fact that the other has not fulfilled some obligation . . . if the former party has, by some illegal act, prevented the latter from fulfilling the obligation in question . . .") The principle that an unlawful action cannot serve as the basis of an action at law, according to Dr. Cheng, "is generally upheld by international tribunals" (Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, 1958, p. 155). Cheng cites, among other cases, the *Clark Claim*, 1862, where the American Commissioner disallowed the claim on behalf of an American citizen in asking : "Can he be allowed, so far as the United States are concerned, to profit by his own wrong ? . . . A party who asks for redress must present himself with clean hands . . ." (John Bassett Moore, *History and Digest of the International Arbitrations to which the United States Has*

Been a Party, 1898, Vol. III, at pp. 2738, 2739). Again, in the *Pelletier* case, 1885, the United States Secretary of State "peremptorily and immediately" dropped pursuit of a claim of one Pelletier against Haiti – though it had been sustained in an arbitral award – on the ground of Pelletier's wrongdoing :

> "*Ex turpi causa non oritur :* by innumerable rulings under Roman common law, as held by nations holding Latin traditions, and under the common law as held in England and the United States, has this principle been applied." (*Foreign Relations of the United States,* 1887, p. 607.)

The Secretary of State further quoted Lord Mansfield as holding that : "The principle of public policy is this : *ex dolo malo non oritur actio.*" (At p. 607.)

271. More recently, Sir Gerald Fitzmaurice – then the Legal Adviser of the Foreign Office, shortly to become a judge of this Court – recorded the application in the international sphere of the common law maxims : "He who seeks equity must do equity" and "He who comes to equity for relief must come with clean hands", and concluded :

> "Thus a State which is guilty of illegal conduct may be deprived of the necessary *locus standi in judicio* for complaining of corresponding illegalities on the part of other States, especially if these were consequential on or were embarked upon in order to counter its own illegality – in short were provoked by it." ("The General Principles of International Law", 92 *Collected Courses,* Academy of International Law, The Hague, (1957-II), p. 119. For further recent support of the authority of the Court to apply a "clean hands" doctrine, see Oscar Schachter, "International Law in the Hostage Crisis", *American Hostages in Iran,* 1985, p. 344.)

272. Nicaragua is precisely such a State which is guilty of illegal conduct. Its conduct accordingly should have been reason enough for the Court to hold that Nicaragua had deprived itself of the necessary *locus standi* to complain of corresponding illegalities on the part of the United States, especially because, if these were illegalities, they were consequential on or were embarked upon in order to counter Nicaragua's own illegality – "in short were provoked by it".

(Signed) Stephen M. SCHWEBEL.

Non-Corrigé
Uncorrected

CR 99/16

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 1999

Public sitting

held on Monday 10 May 1999, at 4.15 p.m., at the Peace Palace,

Vice-President Weeramantry, Acting President, presiding

in the case concerning Legality of Use of Force

(Yugoslavia v. *Canada)*

Request for the indication of provisional measures

VERBATIM RECORD

ANNEE 1999

Audience publique

tenue le lundi 10 mai 1999, à 16 h 15, au Palais de la Paix,

sous la présidence de M. Weeramantry, vice-président faisant fonction de président

dans l'affaire relative à la Licéité de l'emploi de la force

(Yougoslavie c. Canada)

Demande en indication de mesure conservatoire

COMPTE RENDU

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it is clearly outside the terms of that instrument. And finally, Mr. President, the Genocide Convention is a completely artificial basis for jurisdiction over an issue that has nothing to do with genocide, and it is especially irrelevant to a request for provisional measures that focus exclusively on the use of force.

5. That, Mr. President, is one branch of our argument today. The other is that this is not an appropriate case for the exercise of the Court's authority to grant provisional measures under Article 41. This is a discretionary power. Its exercise should never be automatic but should depend on the circumstances of the case. The Court should accordingly exercise its authority judiciously, taking account of *all* the circumstances under which the request is brought and of the underlying dispute. I respectfully suggest that it would be an inappropriate use of the power under Article 41 to lend aid and comfort to an applicant that comes to the Court, in such a matter as this, without clean hands. It would be a tragically misguided use of the power to lend credence to the unsubstantiated humanitarian accusations of a party whose own humanitarian abuses are at the root of the present dispute. It would turn reality on its head.

6. The measures sought today by the Applicant would not *avoid* irreparable harm, which is the principle governing provisional measures; they would *create* irreparable harm. It would be unthinkable that measures should be aimed at the NATO operations without addressing the fundamental root of the dispute, which is the conduct of the Federal Republic of Yugoslavia and its agents on the ground against the Albanian population of Kosovo. Any measures constraining the use of force by the NATO allies — and thus any measures in favour of the Applicant in this proceeding — would, as a matter of political reality, simply postpone the day when the tragedy in Kosovo is brought to an end and a political settlement is achieved. I will touch on some of the facts, but only as they relate to the criteria for indicating provisional measures. The Applicant's argument this morning was addressed on to merits as if we had already reached the merits phase and, while reserving our rights, it would be inappropriate for me to join issue on most of these allegations at this stage.

7. I turn now, Mr. President, to the first of our two principal points — the lack of prima facie jurisdiction.

Non-Corrigé
Uncorrected

CR 99/27

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 1999

Public sitting

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Vice-President Weeramantry, Acting President, presiding

in the case concerning Legality of Use of Force

(Yugoslavia **v.** *Canada)*

Request for the indication of provisional measures

VERBATIM RECORD

ANNEE 1999

Audience publique

tenue le mercredi 12 mai 1999, à 15 h 20, au Palais de la Paix,

sous la présidence de M. Weeramantry, vice-président faisant fonction de président

dans l'affaire relative à la Licéité de l'emploi de la force

(Yougoslavie c. Canada)

Demande en indication de mesure conservatoire

COMPTE RENDU

The VICE-PRESIDENT, acting President: The Court will now proceed to hear the submissions of Canada in the second round of pleadings. I call upon the distinguished Agent of Canada.

Mr. KIRSCH: Mr. President, distinguished Members of the Court,

Before addressing some of the arguments of the Applicant this morning, I would like to recall that our representations in the first round were based on two basic propositions. First, we challenged the existence of prima facie jurisdiction as required as a precondition for the exercise of the Court's authority under Article 41. Second, we submitted that provisional measures would be an inappropriate use of the Court's discretion in the circumstances of the case.

I first wish to draw the attention of the Court to a glaring omission in the response of the Federal Republic of Yugoslavia: the absence of any reference to the second branch of our arguments: the inappropriateness of provisional measures. This is all the more striking that not only Canada, but I believe all the other Respondents, drew attention to the numerous breaches by the Federal Republic of Yugoslavia of international legal obligations *erga omnes*, and to the dreadful consequences of these violations on the Kosovar people and in neighbouring countries. That the Federal Republic of Yugoslavia did not even attempt to address these issues speaks volumes on its own awareness that it has come to the Court without clean hands. On this point, I will simply refer the Court to Canada's original submission.

It was noted this morning that the Respondents did not address the merits at this stage. Indeed, Canada and the other Respondents abstained quite properly. Provisional measures involve prima facie jurisdiction, irreparable harm and urgency, according to the consistent practice of the Court. They do not involve a preliminary assessment of the merits — the establishment of a substantial likelihood of success. That is not one of the tests under Article 41.

We reject with vigour, Mr. President, the assertion of wrongdoing made this morning, but we cannot be expected to respond to these sweeping generalizations in the context of summary proceedings in which only a narrow range of quite different considerations is relevant.

Having said that, I would like to address briefly four issues.

Non-Corrigé
Uncorrected

CR 99/23

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 1999

Public sitting

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Vice-President Weeramantry, Acting President, presiding

in the case concerning Legality of Use of Force

(Yugoslavia v. *United Kingdom)*

Request for the indication of provisional measures

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ANNEE 1999

Audience publique

tenue le mardi 11 mai 1999, à 15 heures, au Palais de la Paix,

sous la présidence de M. Weeramantry, vice-président faisant fonction de président

dans l'affaire relative à la Licéité de l'emploi de la force

(Yougoslavie c. Royaume-Uni)

Demande en indication de mesures conservatoires

COMPTE RENDU

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22. Mr. President, distinguished Members of the Court, the Applicant would have you believe that the situation in Kosovo is simple, a case of unwarranted external intervention. Counsel told you yesterday that if once the external intervention was stopped, the situation inside Kosovo would resolve itself into a model of ethnic harmony. You will know that such a depiction is wholly incredible. It is a travesty of the facts. It tries to banish from view the desperate humanitarian circumstances which led to our actions and the relief of which is our sole purpose. Not only that, but it tries to blind you to what happened since, as a result of the calculated policies of the Federal Republic of Yugoslavia. What the world requires — what in our submission international law requires — is that the inhabitants of Kosovo are able to return to their homes, are able to live there in peace and to rebuild their shattered lives. It is obvious that that requires far more than just the application of some simplistic nostrum: "stop the bombing". It means that the people of Kosovo must be protected against new atrocities. That is the reason why the G-8 Foreign Ministers adopted on 6 May seven principles designed to ensure the safe and free return of all refugees and displaced persons and conditions for a peaceful and normal life for all inhabitants in Kosovo.

23. So the Court, with respect, must ask itself what the effect would be of granting the provisional measures which the Federal Republic of Yugoslavia is urging upon it. The Court, with respect, is bound to consider that. But the Court may readily reach the conclusion that what the Federal Republic of Yugoslavia wants to achieve is to use the Court's processes to secure for itself a free hand to complete its planned campaign of "ethnic cleansing". At present the military action, directed specifically at the means of pursuing the oppression of the Kosovar Albanians, is the only thing holding the oppressors back. Imagine, imagine what the situation would be in the refugees' tented camps next winter if that restraint were lifted. Imagine the public reaction if a judicial proceeding in this Court were to lead to that result.

24. I come therefore, Mr. President, to my final point. This is whether the Court ought to be entertaining this request from the Federal Republic of Yugoslavia at all. I have already described it, in its careless disregard of the legal requirements, as an abuse of the process of the Court. It deserves to be dismissed on that ground alone. There is, however, Mr. President, a deeper point. In my own legal system a remedy like "provisional measures" would lie at the discretion of the

Court. In considering whether or not to exercise that discretion, the Court would weigh up all the equities. In weighing up all the equities, the Court would pay particular attention as to whether the party seeking its assistance came with clean hands. The Court would not, however, allow its process to be used as an engine to assist turpitude. I can see no reason why exactly the same principles should not be applied by this honourable Court. They are deeply rooted in the essential nature of the judicial function. They should be regarded as "general principles of law" within the meaning of Article 38 of the Statute.

25. For this reason, as much as for any other, the Court should summarily dismiss the request.

Mr. President, I now ask you to call upon Professor Greenwood to develop our jurisdictional arguments.

The VICE-PRESIDENT, acting President: Thank you, Attorney-General. Professor Greenwood please.

Mr. GREENWOOD: Mr. President, Members of the Court, may it please the Court.

1. It is an honour to appear before you once again on behalf of my country.

2. The Attorney-General has already set out the conditions which must exist before the Court can indicate provisional measures of protection. With your permission, Mr. President, I shall now develop our arguments in respect of each of those conditions. I shall show:

First, that there is no prima facie basis for jurisdiction in the present case;

Secondly, that the provisional measures sought by the Applicant are *not* for the protection of rights which might form the basis of a judgment in the present case; and

Thirdly, that, in any event, the circumstances of the present case are such that there is no threat, let alone an urgent threat, of irreparable damage being caused to any rights of the Applicant which might form the basis of a judgment.

I can be brief, Mr. President, because the Federal Republic of Yugoslavia has skated over all of this in its Application and request and its counsel yesterday made scarcely any attempt to show that these conditions have been met.

Non-Corrigé
Uncorrected

CR 99/24

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 1999

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held on Tuesday 11 May 1999, at 4.30 p.m., at the Peace Palace,

Vice-President Weeramantry, Acting President, presiding

in the case concerning Legality of Use of Force

(Yugoslavia **v.** *United States of America)*

Request for the indication of provisional measures

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sous la présidence de M. Weeramantry, vice-président faisant fonction de président

dans l'affaire relative à la Licéité de l'emploi de la force

(Yougoslavie c. Etats-Unis d'Amérique)

Demande en indication de mesures conservatoires

COMPTE RENDU

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of further genocidal action (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 8 April 1993*, para. 48). In the present case, such a judgment might be made about the actions of the Federal Republic of Yugoslavia in Kosovo, but certainly not about the actions of NATO forces in response.

Provisional measures are inappropriate because of Applicant's conduct

3.17. Finally, the indication of provisional measures against the United States and other Respondents would be inappropriate because the Applicant does not come to the Court with clean hands. Having committed a campaign of extensive ethnic cleansing and other atrocities in Kosovo, the Applicant has now come to the Court asking for protection against the consequences of those unlawful acts.

3.18. The principle that a party in litigation may not attempt to reap advantages from its own wrong is well established in international law (see B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, pp. 149-158 (reprint ed. 1987)). This principle is often expressed in the Latin phrase *nullus commodum capere de sua injuria propria* ("no one can be allowed to take advantage of his own wrong"). Numerous arbitral decisions reflect the unwillingness of international tribunals to grant relief to parties whose own conduct with respect to the underlying dispute was wrongful (see, for example, *Tippets, Abbett, McCarthy, Stratton* v. *TAMS-AFFA*, 6 Iran-U.S.C.R.T., pp. 219, 228 (1994); *Diversion of Water from the River Meuse, P.C.I.J., Series A/B, No. 70*, p. 77). Since the Court must assess all relevant circumstances in considering whether to grant provisional measures, it should take due account of this principle as well.

3.19. For the Court to grant provisional measures against the respondent States for their actions to curb the campaign of atrocities committed by the Applicant would reward the wrongdoer for its misdeeds and shield it from their consequences. Any provisional measures that did not focus on the conduct of the Applicant would be a serious injustice which could have deplorable consequences for the people of Kosovo.

3.20. For these compelling reasons, we strongly believe that the indication of provisional measures, as requested by the Applicant, would be wholly inappropriate in this case, even if the Court were to conclude that it had prima facie jurisdiction — which we believe is clearly not the case.

3.21. Mr. President, I thank the Court for its attention. I now suggest that it invite the United States Agent, Mr. Andrews, to conclude the presentation of the United States. Thank you.

The VICE-PRESIDENT, acting President: Thank you, Mr. Matheson. I now invite Mr. Andrews to make the concluding presentation of the United States.

Mr. ANDREWS: Thank you, Mr. President.

4.1. Mr. President, Members of the Court, we have shown why the Court cannot and should not grant provisional measures against the United States, as requested by the Applicant. We have shown that the Court does not have even prima facie jurisdiction, that the United States has clearly never consented to the jurisdiction of the Court under the Genocide Convention, and that this precludes the indication of provisional measures against the United States. We have shown that, even if the Court had prima facie jurisdiction, the granting of provisional measures against the United States — particularly measures of the character requested by the Applicant — would be wholly inappropriate in the circumstances of this case.

4.2. The case against the United States is, of course, but one of ten suits brought against various NATO member States. In this broader context, we encourage the Court to bear in mind that, as we have shown, the indication of provisional measures is a matter of discretion to be considered in light of all relevant factors. In light of this, it is essential that the Court consider carefully the possible effects of its decision on the current international efforts to resolve the Kosovo crisis and to protect the people of Kosovo.

4.3. No doubt the Court is aware of the important meeting just concluded in Germany among the Foreign Ministers of the so-called G-8 Group, which is comprised of Russia, Japan and six NATO countries. On 6 May, that Group adopted a series of general principles on the solution to the Kosovo crisis, which includes: the immediate end of violence and repression in Kosovo; the

SEPARATE OPINION OF JUDGE ELARABY

The nature and scope of United Nations responsibility — The international legal status of the Occupied Palestinian Territory — Historical survey — The law of belligerent occupation, including current situation of prolonged occupation, principle of military necessity, breaches of international humanitarian law and the erga omnes *right to self-determination of the Palestinian people.*

I would like to express, at the outset, my complete and unqualified support for the findings and conclusions of the Court. I consider it necessary, however, to exercise my entitlement under Article 57 of the Statute, to append this separate opinion to elaborate on some of the historical and legal aspects contained in the Advisory Opinion.

I feel obliged, with considerable reluctance, to start by referring to paragraph 8 of the Advisory Opinion. In my view, as Judge Lachs wrote in his separate opinion in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Judgment*, "A judge — as needs no emphasis — is bound to be impartial, objective, detached, disinterested and unbiased." (*I.C.J. Reports 1986*, p. 158.) Throughout the consideration of this Advisory Opinion, I exerted every effort to be guided by this wise maxim which has a wider scope than the solemn declaration every judge makes in conformity with Article 20 of the Statute of the International Court of Justice.

In this separate opinion, I will address three interrelated points:

(i) the nature and scope of the United Nations responsibility;

(ii) the international legal status of the Occupied Palestinian Territory;
(iii) the law of belligerent occupation.

I. The Nature and Scope of the United Nations Responsibility

1. The first point to be emphasized is the need to spell out the nature and the wide-ranging scope of the United Nations historical and legal responsibility towards Palestine. Indeed, the Court has referred to this special responsibility when it held that:

"The responsibility of the United Nations in this matter also has

dated 14 April 2004, over two months before the delivery of the Advisory Opinion.

The Court reached the correct conclusion regarding the characterization of the wall when it held that:

> "the construction of the wall and its associated régime create a 'fait accompli' on the ground that could well become permanent, in which case, and notwithstanding the formal characterization of the wall by Israel, it would be tantamount to *de facto* annexation" (Advisory Opinion, para. 121).

It is submitted that this finding should have been reflected in the *dispositif* with an affirmation that the Occupied Palestinian Territory cannot be annexed. It would also have been appropriate, in my view, to refer to the implications of the letter of the Prime Minister of Israel and its attachments and to underline that what it purports to declare is a breach of Israel's obligations and contrary to international law.

III. The Law of Belligerent Occupation

The Court was requested by the General Assembly to urgently render an advisory opinion on "the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory" (A/RES/ES-10/14-A/ES-10/L.16). The focus of the request evolves around the law of belligerent occupation. As already stated, I do concur with the reasoning and conclusions in the Advisory Opinion. I feel constrained, however, to emphasize and elaborate on some points:

(a) the prolonged occupation;
(b) the scope and limitations of the principle of military necessity;
(c) the grave breaches of international humanitarian law; and
(d) the right to self-determination.

3.1. The prohibition of the use of force, as enshrined in Article 2, paragraph 4, of the Charter, is no doubt the most important principle that emerged in the twentieth century. It is universally recognized as a *jus cogens* principle, a peremptory norm from which no derogation is permitted. The Court recalls in paragraph 87, the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States (resolution 2625 (XXV)), which provides an agreed interpretation of Article 2 (4). The Declaration "emphasized that 'No territorial acquisition resulting from the threat or use of force shall be recognized as legal'" (Advisory Opinion, para. 87). The general principle that an illegal act cannot produce legal rights — *ex injuria jus non oritur* — is well recognized in international law.

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

CASE CONCERNING OIL PLATFORMS

(ISLAMIC REPUBLIC OF IRAN *v.* UNITED STATES OF AMERICA)

JUDGMENT OF 6 NOVEMBER 2003

2003

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRE DES PLATES-FORMES PÉTROLIÈRES

(RÉPUBLIQUE ISLAMIQUE D'IRAN c. ÉTATS-UNIS D'AMÉRIQUE)

ARRÊT DU 6 NOVEMBRE 2003

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an escort mission; four days later the United States, again asserting the right of self-defence, employed its naval forces to attack and destroy simultaneously the Nasr ["Sirri"] and Salman ["Sassan"] complexes.

26. These attacks by United States forces on the Iranian oil platforms are claimed by Iran to constitute breaches of the 1955 Treaty; and the attacks on the *Sea Isle City* and the USS *Samuel B. Roberts* were invoked in support of the United States' claim to act in self-defence. The counter-claim of the United States is however not limited to those attacks; according to the United States, Iran was in breach of its obligations under Article X, paragraph 1, of the 1955 Treaty, "in attacking vessels in the Gulf with mines and missiles and otherwise engaging in military actions that were dangerous and detrimental to commerce and navigation between the territories of the United States and the Islamic Republic of Iran". According to the United States, Iran conducted an aggressive policy and was responsible for more than 200 attacks against neutral shipping in international waters and the territorial seas of Persian Gulf States. Iran denies responsibility for those attacks, suggesting that they were committed by Iraq and drawing attention to Iraq's interest in internationalizing the conflict. Furthermore, Iran claims that the attitude of the Iranian authorities and the measures taken by its naval forces in the Persian Gulf were solely defensive in nature. It has emphasized that Iraq was the aggressor State in the conflict, and has claimed that Iraq received diplomatic, political, economic and military support from a number of third countries that were not formally parties to the conflict, including Kuwait, Saudi Arabia and the United States.

*

27. The Court will first consider a contention to which the United States appears to have attributed a certain preliminary character. The United States asks the Court to dismiss Iran's claim and refuse it the relief it seeks, because of Iran's allegedly unlawful conduct, i.e., its violation of the 1955 Treaty and other rules of international law relating to the use of force. The United States invokes what it suggests are three related principles in support of this request. First, a party that acts improperly with respect to the subject-matter of a dispute is not entitled to relief; according to the United States, Iran had committed, at the time of the actions against the platforms, manifestly illegal armed attacks on United States and other neutral shipping in the Persian Gulf, and it has misrepresented, in the present proceedings, the facts of the case before the Court. Second, a party that has itself violated obligations identical to those that are the basis for its application is not entitled to relief and Iran had allegedly infringed itself the "mutual and reciprocal" obligations arising from the 1955 Treaty. Third, an applicant is not entitled to relief when the actions it complains of were the result of its own wrongful con-

duct. Thus the United States claims that the attacks on the platforms were a consequence of Iran's previous wrongful behaviour in the Persian Gulf.

28. Iran responds that the concept of "clean hands" underlying these arguments of the United States, "while reflecting and incorporating fundamental principles of law inspired by good faith, is not an autonomous legal institution". It contends that the concept of "clean hands" requires the operation of other institutions or legal rules for its implementation. Iran argues that the "plaintiff's own wrongful conduct" as a ground for inadmissibility of a claim relates to claims arising in the context of diplomatic protection and concerns only a foreign individual's "clean hands", but that such a principle is irrelevant in direct State-to-State claims. According to Iran, as far as State-to-State claims are concerned, such principle may have legal significance only at the merits stage, and only at the stage of quantification of damages, but does not deprive a State of *locus standi in judicio*.

29. The Court notes that these issues were first raised by the United States in its Counter-Memorial, after the Judgment of the Court of 12 December 1996 on the preliminary objection of the United States to jurisdiction. In that pleading those issues were dealt with at the end, after the United States had set out its arguments on the merits, and not by way of a preliminary issue. In subsequent pleadings and in oral argument it has presented them as having rather a preliminary character, but it has nevertheless not gone so far as to suggest that they are issues of admissibility, appropriate to be enquired into before any examination of the merits. Objections to admissibility normally take the form of an assertion that, even if the Court has jurisdiction and the facts stated by the applicant State are assumed to be correct, nonetheless there are reasons why the Court should not proceed to an examination of the merits. That is not the case here. The United States does not ask the Court to find Iran's claim inadmissible; it asks the Court to dismiss that claim. It does not argue that the Court should be debarred from examining the merits of the Iranian claim on the grounds of Iran's conduct; rather it argues that Iran's conduct is such that it "precludes it from any right to the relief it seeks from this Court", or that it "should not be permitted to recover on its claim". The United States invites the Court to make a finding "that the United States measures against the platforms were the consequence of Iran's own unlawful uses of force" and submits that the "appropriate legal consequences should be attached to that finding". The Court notes that in order to make that finding it would have to examine Iranian and United States actions in the Persian Gulf during the relevant period — which it has also to do in order to rule on the Iranian claim and the United States counter-claim.

30. At this stage of its judgment, therefore, the Court does not need to deal with the request of the United States to dismiss Iran's claim and refuse the relief that it seeks on the basis of the conduct attributed to Iran. The Court will now proceed to the consideration of the claims made by Iran and the defences put forward by the United States.

* * *

31. As noted above (paragraph 21), the dispute in the present case has been brought before the Court on the jurisdictional basis of Article XXI, paragraph 2, of the 1955 Treaty, which provides that

> "Any dispute between the High Contracting Parties as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the High Contracting Parties agree to settlement by some other pacific means."

By its Judgment of 12 December 1996, the Court found that it had jurisdiction, on the basis of this Article, "to entertain the claims made by the Islamic Republic of Iran under Article X, paragraph 1, of that Treaty" (*I.C.J. Reports 1996 (II)*, p. 821, para. 55 (2)), which provides, as noted above (paragraph 22), that "Between the territories of the two High Contracting Parties there shall be freedom of commerce and navigation." In the reasoning of that Judgment, the Court indicated that another Article of the Treaty relied on by Iran, Article IV (which relates to reciprocal treatment of nationals and companies of each party), could not "form the basis of the Court's jurisdiction" (*ibid.*, p. 816, para. 36). It found further that Article I of the Treaty, which provides that "There shall be firm and enduring peace and sincere friendship between the United States of America and Iran", while being "such as to throw light on the interpretation of the other Treaty provisions" and "thus not without legal significance for such an interpretation, . . . cannot, taken in isolation, be a basis for the jurisdiction of the Court" (*ibid.*, p. 815, para. 31). The task of the Court is thus to ascertain whether there has been a breach by the United States of the provisions of Article X, paragraph 1; other provisions of the Treaty are only relevant in so far as they may affect the interpretation or application of that text.

32. In that respect, the Court notes that the United States has relied on Article XX, paragraph 1 *(d)*, of the Treaty as determinative of the question of the existence of a breach of its obligations under Article X. That paragraph provides that

> "The present Treaty shall not preclude the application of measures:
>
> . . . . . .

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

CASE CONCERNING AVENA AND OTHER MEXICAN NATIONALS

(MEXICO *v.* UNITED STATES OF AMERICA)

JUDGMENT OF 31 MARCH 2004

2004

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRE AVENA ET AUTRES RESSORTISSANTS MEXICAINS

(MEXIQUE c. ÉTATS-UNIS D'AMÉRIQUE)

ARRÊT DU 31 MARS 2004

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31 MARCH 2004

JUDGMENT

AVENA AND OTHER MEXICAN NATIONALS
(MEXICO *v.* UNITED STATES OF AMERICA)

AVENA ET AUTRES RESSORTISSANTS MEXICAINS
(MEXIQUE c. ÉTATS-UNIS D'AMÉRIQUE)

31 MARS 2004

ARRÊT

INTERNATIONAL COURT OF JUSTICE

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31 March
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31 March 2004

CASE CONCERNING AVENA AND OTHER MEXICAN NATIONALS

(MEXICO *v.* UNITED STATES OF AMERICA)

Facts of the case — Article 36 of the Vienna Convention on Consular Relations of 24 April 1963.

* *

Mexico's objection to the United States objections to jurisdiction and admissibility — United States objections not presented as preliminary objections —Article 79 of Rules of Court not pertinent in present case.

* *

Jurisdiction of the Court.

First United States objection to jurisdiction — Contention that Mexico's submissions invite the Court to rule on the operation of the United States criminal justice system — Jurisdiction of Court to determine the nature and extent of obligations arising under Vienna Convention — Enquiry into the conduct of criminal proceedings in United States courts a matter belonging to the merits.

Second United States objection to jurisdiction — Contention that the first submission of Mexico's Memorial is excluded from the Court's jurisdiction — Mexico defending an interpretation of the Vienna Convention whereby not only the absence of consular notification but also the arrest, detention, trial and conviction of its nationals were unlawful, failing such notification — Interpretation of Vienna Convention a matter within the Court's jurisdiction.

Third United States objection to jurisdiction — Contention that Mexico's submissions on remedies go beyond the Court's jurisdiction — Jurisdiction of Court to consider the question of remedies — Question whether or how far the Court may order the requested remedies a matter belonging to the merits.

Fourth United States objection to jurisdiction — Contention that the Court lacks jurisdiction to determine whether or not consular notification is a human right — Question of interpretation of Vienna Convention.

* *

Admissibility of Mexico's claims.

First United States objection to admissibility — Contention that Mexico's submissions on remedies seek to have the Court function as a court of criminal appeal — Question belonging to the merits.

Second United States objection to admissibility — Contention that Mexico's claims to exercise its right of diplomatic protection are inadmissible on grounds that local remedies have not been exhausted — Interdependence in the present case of rights of the State and of individual rights — Mexico requesting the Court to rule on the violation of rights which it suffered both directly and through the violation of individual rights of its nationals — Duty to exhaust local remedies does not apply to such a request.

Third United States objection to admissibility — Contention that certain Mexican nationals also have United States nationality — Question belonging to the merits.

Fourth United States objection to admissibility — Contention that Mexico had actual knowledge of a breach but failed to bring such breach to the attention of the United States or did so only after considerable delay — No contention in the present case of any prejudice caused by such delay — No implied waiver by Mexico of its rights.

Fifth United States objection to admissibility — Contention that Mexico invokes standards that it does not follow in its own practice — Nature of Vienna Convention precludes such an argument.

* *

Article 36, paragraph 1 — Mexican nationality of 52 individuals concerned — United States has not proved its contention that some were also United States nationals.

Article 36, paragraph 1 (b) *— Consular information — Duty to provide consular information as soon as arresting authorities realize that arrested person is a foreign national, or have grounds for so believing — Provision of consular information in parallel with reading of "Miranda rights" — Contention that seven individuals stated at the time of arrest that they were United States nationals — Interpretation of phrase "without delay" — Violation by United States of the obligation to provide consular information in 51 cases.*

Consular notification — Violation by United States of the obligation of consular notification in 49 cases.

Article 36, paragraph 1 (a) *and* (c) *— Interrelated nature of the three subparagraphs of paragraph 1 — Violation by United States of the obligation to enable Mexican consular officers to communicate with, have access to and visit their nationals in 49 cases — Violation by United States of the obligation to*

enable Mexican consular officers to arrange for legal representation of their nationals in 34 cases.

Article 36, paragraph 2 — "Procedural default" rule — Possibility of judicial remedies still open in 49 cases — Violation by United States of its obligations under Article 36, paragraph 2, in three cases.

* *

Legal consequences of the breach.

Question of adequate reparation for violations of Article 36 — Review and reconsideration by United States courts of convictions and sentences of the Mexican nationals — Choice of means left to United States — Review and reconsideration to be carried out by taking account of violation of Vienna Convention rights — "Procedural default" rule.

Judicial process suited to the task of review and reconsideration — Clemency process, as currently practised within the United States criminal justice system, not sufficient in itself to serve as appropriate means of "review and reconsideration" — Appropriate clemency procedures can supplement judicial review and reconsideration.

Mexico requesting cessation of wrongful acts and guarantees and assurances of non-repetition — No evidence to establish "regular and continuing" pattern of breaches by United States of Article 36 of Vienna Convention — Measures taken by United States to comply with its obligations under Article 36, paragraph 1 — Commitment undertaken by United States to ensure implementation of its obligations under that provision.

* *

No a contrario *argument can be made in respect of the Court's findings in the present Judgment concerning Mexican nationals.*

* *

United States obligations declared in Judgment replace those arising from Provisional Measures Order of 5 February 2003 — In the three cases where the United States violated its obligations under Article 36, paragraph 2, it must find an appropriate remedy having the nature of review and reconsideration according to the criteria indicated in the Judgment.

JUDGMENT

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.

In the case concerning Avena and other Mexican nationals,

between

the United Mexican States,

represented by

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

as Agent;

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

as Agent (until 12 February 2004);

Mr. Arturo A. Dager, Legal Adviser, Ministry of Foreign Affairs, Mexico City,

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

as Agents (from 2 March 2004);

H.E. Ms Sandra Fuentes Berain, Ambassador-Designate of Mexico to the Kingdom of the Netherlands,

as Agent (from 17 March 2004);

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

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

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

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

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

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

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

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

as Counsellors and Advocates;

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

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

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

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

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

Mr. Mark Warren, International Law Researcher, Ottawa,

as Advisers;

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

as Assistant,

and

the United States of America,

represented by

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

as Agent;

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

as Co-Agent;

Ms Catherine W. Brown, Assistant Legal Adviser for Consular Affairs, United States Department of State,
Mr. D. Stephen Mathias, Assistant Legal Adviser for United Nations Affairs, United States Department of State,
Mr. Patrick F. Philbin, Associate Deputy Attorney General, United States Department of Justice,
Mr. John Byron Sandage, Attorney-Adviser for United Nations Affairs, United States Department of State,
Mr. Thomas Weigend, Professor of Law and Director of the Institute of Foreign and International Criminal Law, University of Cologne,
Ms Elisabeth Zoller, Professor of Public Law, University of Paris II (Panthéon-Assas),

as Counsel and Advocates;

Mr. Jacob Katz Cogan, Attorney-Adviser for United Nations Affairs, United States Department of State,
Ms Sara Criscitelli, Member of the Bar of the State of New York,
Mr. Robert J. Erickson, Principal Deputy Chief, Criminal Appellate Section, United States Department of Justice,
Mr. Noel J. Francisco, Deputy Assistant Attorney General, Office of Legal Counsel, United States Department of Justice,

Mr. Steven Hill, Attorney-Adviser for Economic and Business Affairs, United States Department of State,
Mr. Clifton M. Johnson, Legal Counsellor, United States Embassy, The Hague,
Mr. David A. Kaye, Deputy Legal Counsellor, United States Embassy, The Hague,
Mr. Peter W. Mason, Attorney-Adviser for Consular Affairs, United States Department of State,

as Counsel;

Ms Barbara Barrett-Spencer, United States Department of State,
Ms Marianne Hata, United States Department of State,
Ms Cecile Jouglet, United States Embassy, Paris,
Ms Joanne Nelligan, United States Department of State,
Ms Laura Romains, United States Embassy, The Hague,

as Administrative Staff,

THE COURT,

composed as above,

after deliberation,

delivers the following Judgment:

1. On 9 January 2003 the United Mexican States (hereinafter referred to as "Mexico") filed in the Registry of the Court an Application instituting proceedings against the United States of America (hereinafter referred to as the "United States") for "violations of the Vienna Convention on Consular Relations" of 24 April 1963 (hereinafter referred to as the "Vienna Convention") allegedly committed by the United States.

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

2. Pursuant to Article 40, paragraph 2, of the Statute, the Application was forthwith communicated to the Government of the United States; and, in accordance with paragraph 3 of that Article, all States entitled to appear before the Court were notified of the Application.

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

By an Order of 5 February 2003, the Court indicated the following provisional measures:

> "*(a)* The United States of America shall take all measures necessary to ensure that Mr. César Roberto Fierro Reyna, Mr. Roberto Moreno Ramos and Mr. Osvaldo Torres Aguilera are not executed pending final judgment in these proceedings;
>
> *(b)* The Government of the United States of America shall inform the Court of all measures taken in implementation of this Order."

It further decided that, "until the Court has rendered its final judgment, it shall remain seised of the matters" which formed the subject of that Order.

In a letter of 2 November 2003, the Agent of the United States advised the Court that the United States had "informed the relevant state authorities of Mexico's application"; that, since the Order of 5 February 2003, the United States had "obtained from them information about the status of the fifty-four cases, including the three cases identified in paragraph 59 (I) *(a)* of that Order"; and that the United States could "confirm that none of the named individuals [had] been executed".

4. In accordance with Article 43 of the Rules of Court, the Registrar sent the notification referred to in Article 63, paragraph 1, of the Statute to all States parties to the Vienna Convention or to that Convention and the Optional Protocol.

5. By an Order of 5 February 2003, the Court, taking account of the views of the Parties, fixed 6 June 2003 and 6 October 2003, respectively, as the time-limits for the filing of a Memorial by Mexico and of a Counter-Memorial by the United States.

6. By an Order of 22 May 2003, the President of the Court, on the joint request of the Agents of the two Parties, extended to 20 June 2003 the time-limit for the filing of the Memorial; the time-limit for the filing of the Counter-Memorial was extended, by the same Order, to 3 November 2003.

By a letter dated 20 June 2003 and received in the Registry on the same day, the Agent of Mexico informed the Court that Mexico was unable for technical reasons to file the original of its Memorial on time and accordingly asked the Court to decide, under Article 44, paragraph 3, of the Rules of Court, that the filing of the Memorial after the expiration of the time-limit fixed therefor would be considered as valid; that letter was accompanied by two electronic copies of the Memorial and its annexes. Mexico having filed the original of the Memorial on 23 June 2003 and the United States having informed the Court, by a letter of 24 June 2003, that it had no comment to make on the matter, the Court decided on 25 June 2003 that the filing would be considered as valid.

7. In a letter of 14 October 2003, the Agent of Mexico expressed his Government's wish to amend its submissions in order to include therein the cases of two Mexican nationals, Mr. Victor Miranda Guerrero and Mr. Tonatihu Aguilar Saucedo, who had been sentenced to death, after the filing of Mexico's Memorial, as a result of criminal proceedings in which, according to Mexico, the United States had failed to comply with its obligations under Article 36 of the Vienna Convention.

In a letter of 2 November 2003, under cover of which the United States filed its Counter-Memorial within the time-limit prescribed, the Agent of the United States informed the Court that his Government objected to the amendment of Mexico's submissions, on the grounds that the request was late, that Mexico had submitted no evidence concerning the alleged facts and that there was not enough time for the United States to investigate them.

In a letter received in the Registry on 28 November 2003, Mexico responded to the United States objection and at the same time amended its submissions so as to withdraw its request for relief in the cases of two Mexican nationals mentioned in the Memorial, Mr. Enrique Zambrano Garibi and Mr. Pedro Hernández Alberto, having come to the conclusion that the former had dual Mexican and United States nationality and that the latter had been informed of his right of consular notification prior to interrogation.

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

8. On 28 November 2003 and 2 December 2003, Mexico filed various documents which it wished to produce in accordance with Article 56 of the Rules of Court. By letters dated 2 December 2003 and 5 December 2003, the Agent of the United States informed the Court that his Government did not object to the production of these new documents and that it intended to exercise its right to comment upon these documents and to submit documents in support of its comments, pursuant to paragraph 3 of that Article. By letters dated 9 December 2003, the Registrar informed the Parties that the Court had taken note that

the United States had no objection to the production of these documents and that accordingly counsel would be free to refer to them in the course of the hearings. On 10 December 2003, the Agent of the United States filed the comments of his Government on the new documents produced by Mexico, together with a number of documents in support of those comments.

9. Since the Court included upon the Bench no judge of Mexican nationality, Mexico availed itself of its right under Article 31, paragraph 2, of the Statute to choose a judge *ad hoc* to sit in the case: it chose Mr. Bernardo Sepúlveda.

10. Pursuant to Article 53, paragraph 2, of its Rules, the Court, having consulted the Parties, decided that copies of the pleadings and documents annexed would be made accessible to the public on the opening of the oral proceedings.

11. Public sittings were held between 15 and 19 December 2003, at which the Court heard the oral arguments and replies of:

For Mexico: H.E. Mr. Juan Manuel Gómez-Robledo,
Ms Sandra L. Babcock,
Mr. Víctor Manuel Uribe Aviña,
Mr. Donald Francis Donovan,
Ms Katherine Birmingham Wilmore,
H.E. Mr. Santiago Oñate,
Ms Socorro Flores Liera,
Mr. Carlos Bernal,
Mr. Dietmar W. Prager,
Mr. Pierre-Marie Dupuy.

For the United States: The Honourable William H. Taft, IV,
Ms Elisabeth Zoller,
Mr. Patrick F. Philbin,
Mr. John Byron Sandage,
Ms Catherine W. Brown,
Mr. D. Stephen Mathias,
Mr. James H. Thessin,
Mr. Thomas Weigend.

*

12. In its Application, Mexico formulated the decision requested in the following terms:

> "The Government of the United Mexican States therefore asks the Court to adjudge and declare:
>
> (1) that the United States, in arresting, detaining, trying, convicting, and sentencing the 54 Mexican nationals on death row described in this Application, violated its international legal obligations to Mexico, in its own right and in the exercise of its right of consular protection of its nationals, as provided by Articles 5 and 36, respectively of the Vienna Convention;
>
> (2) that Mexico is therefore entitled to *restitutio in integrum*;
> (3) that the United States is under an international legal obligation not to

apply the doctrine of procedural default, or any other doctrine of its municipal law, to preclude the exercise of the rights afforded by Article 36 of the Vienna Convention;

(4) that the United States is under an international legal obligation to carry out in conformity with the foregoing international legal obligations any future detention of or criminal proceedings against the 54 Mexican nationals on death row or any other Mexican national in its territory, whether by a constituent, legislative, executive, judicial or other power, whether that power holds a superior or a subordinate position in the organization of the United States, and whether that power's functions are international or internal in character;

(5) that the right to consular notification under the Vienna Convention is a human right;

and that, pursuant to the foregoing international legal obligations,

(1) the United States must restore the *status quo ante*, that is, re-establish the situation that existed before the detention of, proceedings against, and convictions and sentences of, Mexico's nationals in violation of the United States international legal obligations;

(2) the United States must take the steps necessary and sufficient to ensure that the provisions of its municipal law enable full effect to be given to the purposes for which the rights afforded by Article 36 are intended;

(3) the United States must take the steps necessary and sufficient to establish a meaningful remedy at law for violations of the rights afforded to Mexico and its nationals by Article 36 of the Vienna Convention, including by barring the imposition, as a matter of municipal law, of any procedural penalty for the failure timely to raise a claim or defence based on the Vienna Convention where competent authorities of the United States have breached their obligation to advise the national of his or her rights under the Convention; and

(4) the United States, in light of the pattern and practice of violations set forth in this Application, must provide Mexico a full guarantee of the non-repetition of the illegal acts."

13. In the course of the written proceedings, the following submissions were presented by the Parties:

On behalf of the Government of Mexico,

in the Memorial:

"For these reasons, . . . the Government of Mexico respectfully requests the Court to adjudge and declare

(1) that the United States, in arresting, detaining, trying, convicting, and sentencing the fifty-four Mexican nationals on death row described in

Mexico's Application and this Memorial, violated its international legal obligations to Mexico, in its own right and in the exercise of its right of diplomatic protection of its nationals, as provided by Article 36 of the Vienna Convention;

(2) that the obligation in Article 36 (1) of the Vienna Convention requires notification before the competent authorities of the receiving State interrogate the foreign national or take any other action potentially detrimental to his or her rights;

(3) that the United States, in applying the doctrine of procedural default, or any other doctrine of its municipal law, to preclude the exercise and review of the rights afforded by Article 36 of the Vienna Convention, violated its international legal obligations to Mexico, in its own right and in the exercise of its right of diplomatic protection of its nationals, as provided by Article 36 of the Vienna Convention; and

(4) that the United States is under an international legal obligation to carry out in conformity with the foregoing international legal obligations any future detention of or criminal proceedings against the fifty-four Mexican nationals on death row and any other Mexican national in its territory, whether by a constituent, legislative, executive, judicial or other power, whether that power holds a superior or a subordinate position in the organization of the United States, and whether that power's functions are international or internal in character;

and that, pursuant to the foregoing international legal obligations,

(1) Mexico is entitled to *restitutio in integrum* and the United States therefore is under an obligation to restore the *status quo ante*, that is, re-establish the situation that existed at the time of the detention and prior to the interrogation of, proceedings against, and convictions and sentences of, Mexico's nationals in violation of the United States' international legal obligations, specifically by, among other things,

(a) vacating the convictions of the fifty-four Mexican nationals;

(b) vacating the sentences of the fifty-four Mexican nationals;

(c) excluding any subsequent proceedings against the fifty-four Mexican nationals any statements and confessions obtained from them prior to notification of their rights to consular notification and access;

(d) preventing the application of any procedural penalty for a Mexican national's failure timely to raise a claim or defence based on the Vienna Convention where competent authorities of the United States have breached their obligation to advise the national of his rights under the Convention;

(e) preventing the application of any municipal law doctrine or judicial holding that prevents a court in the United States from providing a remedy, including the relief to which this Court holds that Mexico is entitled here, to a Mexican national whose Article 36 rights have been violated; and

(f) preventing the application of any municipal law doctrine or judicial holding that requires an individualized showing of prejudice as a prerequisite to relief for the violations of Article 36;

(2) the United States, in light of the regular and continuous violations set forth in Mexico's Application and Memorial, is under an obligation to take all legislative, executive, and judicial steps necessary to:

(a) ensure that the regular and continuing violations of the Article 36 consular notification, access, and assistance rights of Mexico and its nationals cease;

(b) guarantee that its competent authorities, of federal, state, and local jurisdiction, maintain regular and routine compliance with their Article 36 obligations;

(c) ensure that its judicial authorities cease applying, and guarantee that in the future they will not apply:

(i) any procedural penalty for a Mexican national's failure timely to raise a claim or defence based on the Vienna Convention where competent authorities of the United States have breached their obligation to advise the national of his or her rights under the Convention;

(ii) any municipal law doctrine or judicial holding that prevents a court in the United States from providing a remedy, including the relief to which this Court holds that Mexico is entitled here, to a Mexican national whose Article 36 rights have been violated; and

(iii) any municipal law doctrine or judicial holding that requires an individualized showing of prejudice as a prerequisite to relief for the Vienna Convention violations shown here."

On behalf of the Government of the United States,

in the Counter-Memorial:

"On the basis of the facts and arguments set out above, the Government of the United States of America requests that the Court adjudge and declare that the claims of the United Mexican States are dismissed."

14. At the oral proceedings, the following submissions were presented by the Parties:

On behalf of the Government of Mexico,

"The Government of Mexico respectfully requests the Court to adjudge and declare

(1) that the United States of America, in arresting, detaining, trying, convicting, and sentencing the 52 Mexican nationals on death row described in Mexico's Memorial, violated its international legal obligations to Mexico, in its own right and in the exercise of its right to diplomatic protection of its nationals, by failing to inform, without delay, the 52 Mexican nationals after their arrest of their right to consular notification and access under Article 36 (1) *(b)* of the Vienna Convention on Consular Relations, and by depriving Mexico of its right to provide consular protection and the 52 nationals' right to receive such protection as Mexico would provide under Article 36 (1) *(a)* and *(c)* of the Convention;

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

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

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

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

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

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

(8) that the United States of America shall cease its violations of Article 36 of the Vienna Convention with regard to Mexico and its 52 nationals and shall provide appropriate guarantees and assurances that it shall take measures sufficient to achieve increased compliance with Article 36 (1) and to ensure compliance with Article 36 (2)."

On behalf of the Government of the United States,

"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 the *LaGrand Case (Germany* v. *United States of America)*, 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."

* * *

15. The present proceedings have been brought by Mexico against the United States on the basis of the Vienna Convention, and of the Optional Protocol providing for the jurisdiction of the Court over "disputes arising out of the interpretation or application" of the Convention. Mexico and the United States are, and were at all relevant times, parties to the Vienna Convention and to the Optional Protocol. Mexico claims that the United States has committed breaches of the Vienna Convention in relation to the treatment of a number of Mexican nationals who have been tried, convicted and sentenced to death in criminal proceedings in the United States. The original claim related to 54 such persons, but as a result of subsequent adjustments to its claim made by Mexico (see paragraph 7 above), only 52 individual cases are involved. These criminal proceedings have been taking place in nine different States of the United States, namely California (28 cases), Texas (15 cases), Illinois (three cases), Arizona (one case), Arkansas (one case), Nevada (one case), Ohio (one case), Oklahoma (one case) and Oregon (one case), between 1979 and the present.

16. For convenience, the names of the 52 individuals, and the numbers by which their cases will be referred to, are set out below:

1. Carlos Avena Guillen
2. Héctor Juan Ayala
3. Vicente Benavides Figueroa
4. Constantino Carrera Montenegro
5. Jorge Contreras López

6. Daniel Covarrubias Sánchez
7. Marcos Esquivel Barrera
8. Rubén Gómez Pérez
9. Jaime Armando Hoyos
10. Arturo Juárez Suárez
11. Juan Manuel López
12. José Lupercio Casares
13. Luis Alberto Maciel Hernández
14. Abelino Manriquez Jáquez
15. Omar Fuentes Martínez (a.k.a. Luis Aviles de la Cruz)
16. Miguel Angel Martínez Sánchez
17. Martín Mendoza García
18. Sergio Ochoa Tamayo
19. Enrique Parra Dueñas
20. Juan de Dios Ramírez Villa
21. Magdaleno Salazar
22. Ramón Salcido Bojórquez
23. Juan Ramón Sánchez Ramírez
24. Ignacio Tafoya Arriola
25. Alfredo Valdez Reyes
26. Eduardo David Vargas
27. Tomás Verano Cruz
28. [Case withdrawn]
29. Samuel Zamudio Jiménez
30. Juan Carlos Alvarez Banda
31. César Roberto Fierro Reyna
32. Héctor García Torres
33. Ignacio Gómez
34. Ramiro Hernández Llanas
35. Ramiro Rubí Ibarra
36. Humberto Leal García
37. Virgilio Maldonado
38. José Ernesto Medellín Rojas
39. Roberto Moreno Ramos
40. Daniel Angel Plata Estrada
41. Rubén Ramírez Cárdenas
42. Félix Rocha Díaz
43. Oswaldo Regalado Soriano
44. Edgar Arias Tamayo
45. Juan Caballero Hernández
46. Mario Flores Urbán
47. Gabriel Solache Romero
48. Martín Raúl Fong Soto
49. Rafael Camargo Ojeda
50. [Case withdrawn]
51. Carlos René Pérez Gutiérrez
52. José Trinidad Loza

53. Osvaldo Netzahualcóyotl Torres Aguilera
54. Horacio Alberto Reyes Camarena

17. The provisions of the Vienna Convention of which Mexico alleges violations are contained in Article 36. Paragraphs 1 and 2 of this Article are set out respectively in paragraphs 50 and 108 below. Article 36 relates, according to its title, to "Communication and contact with nationals of the sending State". Paragraph 1 *(b)* of that Article provides that if a national of that State "is arrested or committed to prison or to custody pending trial or is detained in any other manner", and he so requests, the local consular post of the sending State is to be notified. The Article goes on to provide that the "competent authorities of the receiving State" shall "inform the person concerned without delay of his rights" in this respect. Mexico claims that in the present case these provisions were not complied with by the United States authorities in respect of the 52 Mexican nationals the subject of its claims. As a result, the United States has according to Mexico committed breaches of paragraph 1 *(b)*; moreover, Mexico claims, for reasons to be explained below (see paragraphs 98 *et seq.*), that the United States is also in breach of paragraph 1 *(a)* and *(c)* and of paragraph 2 of Article 36, in view of the relationship of these provisions with paragraph 1 *(b)*.

18. As regards the terminology employed to designate the obligations incumbent upon the receiving State under Article 36, paragraph 1 *(b)*, the Court notes that the Parties have used the terms "inform" and "notify" in differing senses. For the sake of clarity, the Court, when speaking in its own name in the present Judgment, will use the word "inform" when referring to an individual being made aware of his rights under that subparagraph and the word "notify" when referring to the giving of notice to the consular post.

19. The underlying facts alleged by Mexico may be briefly described as follows: some are conceded by the United States, and some disputed. Mexico states that all the individuals the subject of its claims were Mexican nationals at the time of their arrest. It further contends that the United States authorities that arrested and interrogated these individuals had sufficient information at their disposal to be aware of the foreign nationality of those individuals. According to Mexico's account, in 50 of the specified cases, Mexican nationals were never informed by the competent United States authorities of their rights under Article 36, paragraph 1 *(b)*, of the Vienna Convention and, in the two remaining cases, such information was not provided "without delay", as required by that provision. Mexico has indicated that in 29 of the 52 cases its consular authorities learned of the detention of the Mexican nationals only after death sentences had been handed down. In the 23 remaining cases, Mexico contends that it learned of the cases through means other than notification to the consular post by the competent United States authorities under Article 36, paragraph 1 *(b)*. It explains that in five cases this

was too late to affect the trials, that in 15 cases the defendants had already made incriminating statements, and that it became aware of the other three cases only after considerable delay.

20. Of the 52 cases referred to in Mexico's final submissions, 49 are currently at different stages of the proceedings before United States judicial authorities at state or federal level, and in three cases, those of Mr. Fierro (case No. 31), Mr. Moreno (case No. 39) and Mr. Torres (case No. 53), judicial remedies within the United States have already been exhausted. The Court has been informed of the variety of types of proceedings and forms of relief available in the criminal justice systems of the United States, which can differ from state to state. In very general terms, and according to the description offered by both Parties in their pleadings, it appears that the 52 cases may be classified into three categories: 24 cases which are currently in direct appeal; 25 cases in which means of direct appeal have been exhausted, but post-conviction relief *(habeas corpus)*, either at state or at federal level, is still available; and three cases in which no judicial remedies remain. The Court also notes that, in at least 33 cases, the alleged breach of the Vienna Convention was raised by the defendant either during pre-trial, at trial, on appeal or in *habeas corpus* proceedings, and that some of these claims were dismissed on procedural or substantive grounds and others are still pending. To date, in none of the 52 cases have the defendants had recourse to the clemency process.

21. On 9 January 2003, the day on which Mexico filed its Application and a request for the indication of provisional measures, all 52 individuals the subject of the claims were on death row. However, two days later the Governor of the State of Illinois, exercising his power of clemency review, commuted the sentences of all convicted individuals awaiting execution in that State, including those of three individuals named in Mexico's Application (Mr. Caballero (case No. 45), Mr. Flores (case No. 46) and Mr. Solache (case No. 47)). By a letter dated 20 January 2003, Mexico informed the Court that, further to that decision, it withdrew its request for the indication of provisional measures on behalf of these three individuals, but that its Application remained unchanged. In the Order of 5 February 2003, mentioned in paragraph 3 above, on the request by Mexico for the indication of provisional measures, the Court considered that it was apparent from the information before it that the three Mexican nationals named in the Application who had exhausted all judicial remedies in the United States (see paragraph 20 above) were at risk of execution in the following months, or even weeks. Consequently, it ordered by way of provisional measure that the United States take all measures necessary to ensure that these individuals would not be executed

pending final judgment in these proceedings. The Court notes that, at the date of the present Judgment, these three individuals have not been executed, but further notes with great concern that, by an Order dated 1 March 2004, the Oklahoma Court of Criminal Appeals has set an execution date of 18 May 2004 for Mr. Torres.

* * *

THE MEXICAN OBJECTION TO THE UNITED STATES OBJECTIONS TO JURISDICTION AND ADMISSIBILITY

22. As noted above, the present dispute has been brought before the Court by Mexico on the basis of the Vienna Convention and the Optional Protocol to that Convention. Article I of the Optional Protocol provides:

> "Disputes arising out of the interpretation or application of the [Vienna] Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by a written application made by any party to the dispute being a Party to the present Protocol."

23. The United States has presented a number of objections to the jurisdiction of the Court, as well as a number of objections to the admissibility of the claims advanced by Mexico. It is however the contention of Mexico that all the objections raised by the United States are inadmissible as having been raised after the expiration of the time-limit laid down by the Rules of Court. Mexico draws attention to the text of Article 79, paragraph 1, of the Rules of Court as amended in 2000, which provides that

> "Any objection by the respondent to the jurisdiction of the Court or to the admissibility of the application, or other objection the decision upon which is requested before any further proceedings on the merits, shall be made in writing as soon as possible, and not later than three months after the delivery of the Memorial."

The previous text of this paragraph required objections to be made "within the time-limit fixed for delivery of the Counter-Memorial". In the present case the Memorial of Mexico was filed on 23 June 2003; the objections of the United States to jurisdiction and admissibility were presented in its Counter-Memorial, filed on 3 November 2003, more than four months later.

24. The United States has observed that, during the proceedings on the request made by Mexico for the indication of provisional measures in this case, it specifically reserved its right to make jurisdictional arguments at the appropriate stage, and that subsequently the Parties agreed that there should be a single round of pleadings. The Court would however emphasize that parties to cases before it cannot, by purporting to "reserve their rights" to take some procedural action, exempt themselves from the application to such action of the provisions of the Statute and Rules of

Court (cf. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Order of 13 September 1993, I.C.J. Reports 1993*, p. 338, para. 28).

The Court notes, however, that Article 79 of the Rules applies only to preliminary objections, as is indicated by the title of the subsection of the Rules which it constitutes. As the Court observed in the *Lockerbie* cases, "if it is to be covered by Article 79, an objection must . . . possess a 'preliminary' character", and "Paragraph 1 of Article 79 of the Rules of Court characterizes as 'preliminary' an objection 'the decision upon which is requested before any further proceedings'" (*Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom) (Libyan Arab Jamahiriya v. United States of America), Preliminary Objections, I.C.J. Reports 1998*, p. 26, para. 47; p. 131, para. 46); and the effect of the timely presentation of such an objection is that the proceedings on the merits are suspended (paragraph 5 of Article 79). An objection that is not presented as a preliminary objection in accordance with paragraph 1 of Article 79 does not thereby become inadmissible. There are of course circumstances in which the party failing to put forward an objection to jurisdiction might be held to have acquiesced in jurisdiction (*Appeal Relating to the Jurisdiction of the ICAO Council, Judgment, I.C.J. Reports 1972*, p. 52, para. 13). However, apart from such circumstances, a party failing to avail itself of the Article 79 procedure may forfeit the right to bring about a suspension of the proceedings on the merits, but can still argue the objection along with the merits. That is indeed what the United States has done in this case; and, for reasons to be indicated below, many of its objections are of such a nature that they would in any event probably have had to be heard along with the merits. The Court concludes that it should not exclude from consideration the objections of the United States to jurisdiction and admissibility by reason of the fact that they were not presented within three months from the date of filing of the Memorial.

25. The United States has submitted four objections to the jurisdiction of the Court, and five to the admissibility of the claims of Mexico. As noted above, these have not been submitted as preliminary objections under Article 79 of the Rules of Court; and they are not of such a nature that the Court would be required to examine and dispose of all of them *in limine*, before dealing with any aspect of the merits of the case. Some are expressed to be only addressed to certain claims; some are addressed to questions of the remedies to be indicated if the Court finds that breaches of the Vienna Convention have been committed; and some are of such a nature that they would have to be dealt with along with the merits. The Court will however now examine each of them in turn.

* *

UNITED STATES OBJECTIONS TO JURISDICTION

26. The United States contends that the Court lacks jurisdiction to decide many of Mexico's claims, inasmuch as Mexico's submissions in the Memorial asked the Court to decide questions which do not arise out of the interpretation or application of the Vienna Convention, and which the United States has never agreed to submit to the Court.

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27. By its first jurisdictional objection, the United States suggested that the Memorial is fundamentally addressed to the treatment of Mexican nationals in the federal and state criminal justice systems of the United States, and the operation of the United States criminal justice system as a whole. It suggested that Mexico's invitation to the Court to make what the United States regards as "far-reaching and unsustainable findings concerning the United States criminal justice systems" would be an abuse of the Court's jurisdiction. At the hearings, the United States contended that Mexico is asking the Court to interpret and apply the treaty as if it were intended principally to govern the operation of a State's criminal justice system as it affects foreign nationals.

28. The Court would recall that its jurisdiction in the present case has been invoked under the Vienna Convention and Optional Protocol to determine the nature and extent of the obligations undertaken by the United States towards Mexico by becoming party to that Convention. If and so far as the Court may find that the obligations accepted by the parties to the Vienna Convention included commitments as to the conduct of their municipal courts in relation to the nationals of other parties, then in order to ascertain whether there have been breaches of the Convention, the Court must be able to examine the actions of those courts in the light of international law. The Court is unable to uphold the contention of the United States that, as a matter of jurisdiction, it is debarred from enquiring into the conduct of criminal proceedings in United States courts. How far it may do so in the present case is a matter for the merits. The first objection of the United States to jurisdiction cannot therefore be upheld.

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29. The second jurisdictional objection presented by the United States was addressed to the first of the submissions presented by Mexico in its Memorial (see paragraph 13 above). The United States pointed out that Article 36 of the Vienna Convention "creates no obligations constraining the rights of the United States to arrest a foreign national"; and that

similarly the "detaining, trying, convicting and sentencing" of Mexican nationals could not constitute breaches of Article 36, which merely lays down obligations of notification. The United States deduced from this that the matters raised in Mexico's first submission are outside the jurisdiction of the Court under the Vienna Convention and the Optional Protocol, and it maintains this objection in response to the revised submission, presented by Mexico at the hearings, whereby it asks the Court to adjudge and declare:

> "That the United States of America, in arresting, detaining, trying, convicting, and sentencing the 52 Mexican nationals on death row described in Mexico's Memorial, violated its international legal obligations to Mexico, in its own right and in the exercise of its right to diplomatic protection of its nationals, by failing to inform, without delay, the 52 Mexican nationals after their arrest of their right to consular notification and access under Article 36 (1) *(b)* of the Vienna Convention on Consular Relations, and by depriving Mexico of its right to provide consular protection and the 52 nationals' right to receive such protection as Mexico would provide under Article 36 (1) *(a)* and *(c)* of the Convention."

30. This issue is a question of interpretation of the obligations imposed by the Vienna Convention. It is true that the only obligation of the receiving State toward a foreign national that is specifically enunciated by Article 36, paragraph 1 *(b)*, of the Vienna Convention is to inform such foreign national of his rights, when he is "arrested or committed to prison or to custody pending trial or is detained in any other manner"; the text does not restrain the receiving State from "arresting, detaining, trying, convicting, and sentencing" the foreign national, or limit its power to do so. However, as regards the detention, trial, conviction and sentence of its nationals, Mexico argues that depriving a foreign national facing criminal proceedings of consular notification and assistance renders those proceedings fundamentally unfair. Mexico explains in this respect that:

> "Consular notification constitutes a basic component of due process by ensuring both the procedural equality of a foreign national in the criminal process and the enforcement of other fundamental due process guarantees to which that national is entitled",

and that "It is therefore an essential requirement for fair criminal proceedings against foreign nationals." In Mexico's contention, "consular notification has been widely recognized as a fundamental due process right, and indeed, a human right". On this basis it argues that the rights of the detained Mexican nationals have been violated by the authorities of the United States, and that those nationals have been "subjected to criminal proceedings without the fairness and dignity to which each person is entitled". Consequently, in the contention of Mexico, "the integrity of these proceedings has been hopelessly undermined, their outcomes rendered irrevocably unjust". For Mexico to contend, on this basis, that not merely the failure to notify, but the arrest, detention, trial and conviction of its nationals were unlawful is to argue in favour of a particular interpretation of the Vienna Convention. Such an interpretation may or may not be confirmed on the merits, but is not excluded from the jurisdiction conferred on the Court by the Optional Protocol to the Vienna Convention. The second objection of the United States to jurisdiction cannot therefore be upheld.

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31. The third objection by the United States to the jurisdiction of the Court refers to the first of the submissions in the Mexican Memorial concerning remedies. By that submission, which was confirmed in substance in the final submissions, Mexico claimed that

> "Mexico is entitled to *restitutio in integrum*, and the United States therefore is under an obligation to restore the *status quo ante*, that is, re-establish the situation that existed at the time of the detention and prior to the interrogation of, proceedings against, and convictions and sentences of, Mexico's nationals in violation of the United States' international legal obligations . . ."

On that basis, Mexico went on in its first submission to invite the Court to declare that the United States was bound to vacate the convictions and sentences of the Mexican nationals concerned, to exclude from any subsequent proceedings any statements and confessions obtained from them, to prevent the application of any procedural penalty for failure to raise a timely defence on the basis of the Convention, and to prevent the application of any municipal law rule preventing courts in the United States from providing a remedy for the violation of Article 36 rights.

32. The United States objects that so to require specific acts by the United States in its municipal criminal justice systems would intrude deeply into the independence of its courts; and that for the Court to

declare that the United States is under a specific obligation to vacate convictions and sentences would be beyond its jurisdiction. The Court, the United States claims, has no jurisdiction to review appropriateness of sentences in criminal cases, and even less to determine guilt or innocence, matters which only a court of criminal appeal could go into.

33. For its part, Mexico points out that the United States accepts that the Court has jurisdiction to interpret the Vienna Convention and to determine the appropriate form of reparation under international law. In Mexico's view, these two considerations are sufficient to defeat the third objection to jurisdiction of the United States.

34. For the same reason as in respect of the second jurisdictional objection, the Court is unable to uphold the contention of the United States that, even if the Court were to find that breaches of the Vienna Convention have been committed by the United States of the kind alleged by Mexico, it would still be without jurisdiction to order *restitutio in integrum* as requested by Mexico. The Court would recall in this regard, as it did in the *LaGrand* case, that, where jurisdiction exists over a dispute on a particular matter, no separate basis for jurisdiction is required by the Court in order to consider the remedies a party has requested for the breach of the obligation (*I.C.J. Reports 2001*, p. 485, para. 48). Whether or how far the Court may order the remedy requested by Mexico are matters to be determined as part of the merits of the dispute. The third objection of the United States to jurisdiction cannot therefore be upheld.

*

35. The fourth and last jurisdictional objection of the United States is that "the Court lacks jurisdiction to determine whether or not consular notification is a 'human right', or to declare fundamental requirements of substantive or procedural due process". As noted above, it is on the basis of Mexico's contention that the right to consular notification has been widely recognized as a fundamental due process right, and indeed a human right, that it argues that the rights of the detained Mexican nationals have been violated by the authorities of the United States, and that they have been "subjected to criminal proceedings without the fairness and dignity to which each person is entitled". The Court observes that Mexico has presented this argument as being a matter of interpretation of Article 36, paragraph 1 *(b)*, and therefore belonging to the merits. The Court considers that this is indeed a question of interpretation of the Vienna Convention, for which it has jurisdiction; the fourth objection of the United States to jurisdiction cannot therefore be upheld.

* *

UNITED STATES OBJECTIONS TO ADMISSIBILITY

36. In its Counter-Memorial, the United States has advanced a number of arguments presented as objections to the admissibility of Mexico's claims. It argues that

> "Before proceeding, the Court should weigh whether characteristics of the case before it today, or special circumstances related to particular claims, render either the entire case, or particular claims, inappropriate for further consideration and decision by the Court."

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37. The first objection under this head is that "Mexico's submissions should be found inadmissible because they seek to have this Court function as a court of criminal appeal"; there is, in the view of the United States, "no other apt characterization of Mexico's two submissions in respect of remedies". The Court notes that this contention is addressed solely to the question of remedies. The United States does not contend on this ground that the Court should decline jurisdiction to enquire into the question of breaches of the Vienna Convention at all, but simply that, if such breaches are shown, the Court should do no more than decide that the United States must provide "review and reconsideration" along the lines indicated in the Judgment in the *LaGrand* case (*I.C.J. Reports 2001*, pp. 513-514, para. 125). The Court notes that this is a matter of merits. The first objection of the United States to admissibility cannot therefore be upheld.

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38. The Court now turns to the objection of the United States based on the rule of exhaustion of local remedies. The United States contends that the Court "should find inadmissible Mexico's claim to exercise its right of diplomatic protection on behalf of any Mexican national who has failed to meet the customary legal requirement of exhaustion of municipal remedies". It asserts that in a number of the cases the subject of Mexico's claims, the detained Mexican national, even with the benefit of the provision of Mexican consular assistance, failed to raise the alleged non-compliance with Article 36, paragraph 1, of the Vienna Convention at the trial. Furthermore, it contends that all of the claims relating to cases referred to in the Mexican Memorial are inadmissible because local remedies remain available in every case. It has drawn attention to the fact that litigation is pending before courts in the United States in a large number of the cases the subject of Mexico's claims and that, in those cases where judicial remedies have been exhausted, the defendants have not had recourse to the clemency process available to them; from this it concludes that none

of the cases "is in an appropriate posture for review by an international tribunal".

39. Mexico responds that the rule of exhaustion of local remedies cannot preclude the admissibility of its claims. It first states that a majority of the Mexican nationals referred to in paragraph 16 above have sought judicial remedies in the United States based on the Vienna Convention and that their claims have been barred, notably on the basis of the procedural default doctrine. In this regard, it quotes the Court's statement in the *LaGrand* case that

> "the United States may not . . . rely before this Court on this fact in order to preclude the admissibility of Germany's [claim] . . ., as it was the United States itself which had failed to carry out its obligation under the Convention to inform the LaGrand brothers" (*I.C.J. Reports 2001*, p. 488, para. 60).

Further, in respect of the other Mexican nationals, Mexico asserts that

> "the courts of the United States have never granted a judicial remedy to any foreign national for a violation of Article 36. The United States courts hold either that Article 36 does not create an individual right, or that a foreign national who has been denied his Article 36 rights but given his constitutional and statutory rights, cannot establish prejudice and therefore cannot get relief."

It concludes that the available judicial remedies are thus ineffective. As for clemency procedures, Mexico contends that they cannot count for purposes of the rule of exhaustion of local remedies, because they are not a judicial remedy.

40. In its final submissions Mexico asks the Court to adjudge and declare that the United States, in failing to comply with Article 36, paragraph 1, of the Vienna Convention, has "violated its international legal obligations to Mexico, in its own right and in the exercise of its right of diplomatic protection of its nationals".

The Court would first observe that the individual rights of Mexican nationals under paragraph 1 *(b)* of Article 36 of the Vienna Convention are rights which are to be asserted, at any rate in the first place, within the domestic legal system of the United States. Only when that process is completed and local remedies are exhausted would Mexico be entitled to espouse the individual claims of its nationals through the procedure of diplomatic protection.

In the present case Mexico does not, however, claim to be acting solely on that basis. It also asserts its own claims, basing them on the injury which it contends that *it has itself suffered, directly and through its*

nationals, as a result of the violation by the United States of the obligations incumbent upon it under Article 36, paragraph 1 *(a)*, *(b)* and *(c)*.

The Court would recall that, in the *LaGrand* case, it recognized that

> "Article 36, paragraph 1 [of the Vienna Convention], creates individual rights [for the national concerned], which . . . may be invoked in this Court by the national State of the detained person" (*I.C.J. Reports 2001*, p. 494, para. 77).

It would further observe that violations of the rights of the individual under Article 36 may entail a violation of the rights of the sending State, and that violations of the rights of the latter may entail a violation of the rights of the individual. In these special circumstances of interdependence of the rights of the State and of individual rights, Mexico may, in submitting a claim in its own name, request the Court to rule on the violation of rights which it claims to have suffered both directly and through the violation of individual rights conferred on Mexican nationals under Article 36, paragraph 1 *(b)*. The duty to exhaust local remedies does not apply to such a request. Further, for reasons just explained, the Court does not find it necessary to deal with Mexico's claims of violation under a distinct heading of diplomatic protection. Without needing to pronounce at this juncture on the issues raised by the procedural default rule, as explained by Mexico in paragraph 39 above, the Court accordingly finds that the second objection by the United States to admissibility cannot be upheld.

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41. The Court now turns to the question of the alleged dual nationality of certain of the Mexican nationals the subject of Mexico's claims. This question is raised by the United States by way of an objection to the admissibility of those claims: the United States contends that in its Memorial Mexico had failed to establish that it may exercise diplomatic protection based on breaches of Mexico's rights under the Vienna Convention with respect to those of its nationals who are also nationals of the United States. The United States regards it as an accepted principle that, when a person arrested or detained in the receiving State is a national of that State, then even if he is also a national of another State party to the Vienna Convention, Article 36 has no application, and the authorities of the receiving State are not required to proceed as laid down in that Article; and Mexico has indicated that, for the purposes of the present case it does not contest that dual nationals have no right to be advised of their rights under Article 36.

42. It has however to be recalled that Mexico, in addition to seeking to exercise diplomatic protection of its nationals, is making a claim in its

own right on the basis of the alleged breaches by the United States of Article 36 of the Vienna Convention. Seen from this standpoint, the question of dual nationality is not one of admissibility, but of merits. A claim may be made by Mexico of breach of Article 36 of the Vienna Convention in relation to any of its nationals, and the United States is thereupon free to show that, because the person concerned was also a United States national, Article 36 had no application to that person, so that no breach of treaty obligations could have occurred. Furthermore, as regards the claim to exercise diplomatic protection, the question whether Mexico is entitled to protect a person having dual Mexican and United States nationality is subordinated to the question whether, in relation to such a person, the United States was under any obligation in terms of Article 36 of the Vienna Convention. It is thus in the course of its examination of the merits that the Court will have to consider whether the individuals concerned, or some of them, were dual nationals in law. Without prejudice to the outcome of such examination, the third objection of the United States to admissibility cannot therefore be upheld.

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43. The Court now turns to the fourth objection advanced by the United States to the admissibility of Mexico's claims: the contention that

> "The Court should not permit Mexico to pursue a claim against the United States with respect to any individual case where Mexico had actual knowledge of a breach of the [Vienna Convention] but failed to bring such breach to the attention of the United States or did so only after considerable delay."

In the Counter-Memorial, the United States advances two considerations in support of this contention: that if the cases had been mentioned promptly, corrective action might have been possible; and that by inaction Mexico created an impression that it considered that the United States was meeting its obligations under the Convention, as Mexico understood them. At the hearings, the United States suggested that Mexico had in effect waived its right to claim in respect of the alleged breaches of the Convention, and to seek reparation.

44. As the Court observed in the case of *Certain Phosphate Lands in Nauru (Nauru* v. *Australia)*, "delay on the part of a claimant State may render an application inadmissible", but "international law does not lay down any specific time-limit in that regard" (*I.C.J. Reports 1992*, pp. 253-254, para. 32). In that case the Court recognized that delay might prejudice the respondent State "with regard to both the establishment of the facts and the determination of the content of the applicable law" (*ibid.*, p. 255, para. 36), but it has not been suggested that there is any such risk of prejudice in the present case. So far as inadmissibility might be based on an implied waiver of rights, the Court considers that only a much

more prolonged and consistent inaction on the part of Mexico than any that the United States has alleged might be interpreted as implying such a waiver. Furthermore, Mexico indicated a number of ways in which it brought to the attention of the United States the breaches which it perceived of the Vienna Convention. The fourth objection of the United States to admissibility cannot therefore be upheld.

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45. The Court has now to examine the objection of the United States that the claim of Mexico is inadmissible in that Mexico should not be allowed to invoke against the United States standards that Mexico does not follow in its own practice. The United States contends that, in accordance with basic principles of administration of justice and the equality of States, both litigants are to be held accountable to the same rules of international law. The objection in this regard was presented in terms of the interpretation of Article 36 of the Vienna Convention, in the sense that, according to the United States, a treaty may not be interpreted so as to impose a significantly greater burden on any one party than the other (*Diversion of Water from the Meuse, Judgment, 1937, P.C.I.J., Series A/B, No. 70*, p. 20).

46. The Court would recall that the United States had already raised an objection of a similar nature before it in the *LaGrand* case; there, the Court held that it need not decide "whether this argument of the United States, if true, would result in the inadmissibility of Germany's submissions", since the United States had failed to prove that Germany's own practice did not conform to the standards it was demanding from the United States (*I.C.J. Reports 2001*, p. 489, para. 63).

47. The Court would recall that it is in any event essential to have in mind the nature of the Vienna Convention. It lays down certain standards to be observed by all States parties, with a view to the "unimpeded conduct of consular relations", which, as the Court observed in 1979, is important in present-day international law "in promoting the development of friendly relations among nations, and ensuring protection and assistance for aliens resident in the territories of other States" (*United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran), Provisional Measures, Order of 15 December 1979, I.C.J. Reports 1979*, pp. 19-20, para. 40). Even if it were shown, therefore, that Mexico's practice as regards the application of Article 36 was not beyond reproach, this would not constitute a ground of objection to the admissibility of Mexico's claim. The fifth objection of the United States to admissibility cannot therefore be upheld.

* * *

48. Having established that it has jurisdiction to entertain Mexico's claims and that they are admissible, the Court will now turn to the merits of those claims.

* *

ARTICLE 36, PARAGRAPH 1

49. In its final submissions Mexico asks the Court to adjudge and declare that,

> "the United States of America, in arresting, detaining, trying, convicting, and sentencing the 52 Mexican nationals on death row described in Mexico's Memorial, violated its international legal obligations to Mexico, in its own right and in the exercise of its right to diplomatic protection of its nationals, by failing to inform, without delay, the 52 Mexican nationals after their arrest of their right to consular notification and access under Article 36 (1) *(b)* of the Vienna Convention on Consular Relations, and by depriving Mexico of its right to provide consular protection and the 52 nationals' right to receive such protection as Mexico would provide under Article 36 (1) *(a)* and *(c)* of the Convention".

50. The Court has already in its Judgment in the *LaGrand* case described Article 36, paragraph 1, as "an interrelated régime designed to facilitate the implementation of the system of consular protection" (*I.C.J. Reports 2001*, p. 492, para. 74). It is thus convenient to set out the entirety of that paragraph.

> "With a view toward facilitating the exercise of consular functions relating to nationals of the sending State:
>
> *(a)* consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;
>
> *(b)* if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities

without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph;

(c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action."

51. The United States as the receiving State does not deny its duty to perform these obligations. However, it claims that the obligations apply only to individuals shown to be of Mexican nationality alone, and not to those of dual Mexican/United States nationality. The United States further contends *inter alia* that it has not committed any breach of Article 36, paragraph 1 *(b)*, upon the proper interpretation of "without delay" as used in that subparagraph.

52. Thus two major issues under Article 36, paragraph 1 *(b)*, that are in dispute between the Parties are, first, the question of the nationality of the individuals concerned; and second, the question of the meaning to be given to the expression "without delay". The Court will examine each of these in turn.

53. The Parties have advanced their contentions as to nationality in three different legal contexts. The United States has begun by making an objection to admissibility, which the Court has already dealt with (see paragraphs 41 and 42 above). The United States has further contended that a substantial number of the 52 persons listed in paragraph 16 above were United States nationals and that it thus had no obligation to these individuals under Article 36, paragraph 1 *(b)*. The Court will address this aspect of the matter in the following paragraphs. Finally, the Parties disagree as to whether the requirement under Article 36, paragraph 1 *(b)*, for the information to be given "without delay" becomes operative upon arrest or upon ascertainment of nationality. The Court will address this issue later (see paragraph 63 below).

54. The Parties disagree as to what each of them must show as regards nationality in connection with the applicability of the terms of Article 36, paragraph 1, and as to how the principles of evidence have been met on the facts of the cases.

55. Both Parties recognize the well-settled principle in international law that a litigant seeking to establish the existence of a fact bears the burden of proving it (cf. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 437, para. 101). Mexico acknowledges that it has the burden of proof to show that the 52 persons listed in paragraph 16 above were Mexican nationals to whom the provisions of Article 36, paragraph 1 *(b)*, in principle apply. It claims it has met this burden by providing to the Court the birth certificates of these nationals, and declarations from 42 of them that they have not acquired United States nationality. Mexico further contends that the burden of proof lies on the United States should it wish to contend that particular arrested persons of Mexican nationality were, at the relevant time, also United States nationals.

56. The United States accepts that in such cases it has the burden of proof to demonstrate United States nationality, but contends that nonetheless the "burden of evidence" as to this remains with Mexico. This distinction is explained by the United States as arising out of the fact that persons of Mexican nationality may also have acquired United States citizenship by operation of law, depending on their parents' dates and places of birth, places of residency, marital status at time of their birth and so forth. In the view of the United States "virtually all such information is in the hands of Mexico through the now 52 individuals it represents". The United States contends that it was the responsibility of Mexico to produce such information, which responsibility it has not discharged.

57. The Court finds that it is for Mexico to show that the 52 persons listed in paragraph 16 above held Mexican nationality at the time of their arrest. The Court notes that to this end Mexico has produced birth certificates and declarations of nationality, whose contents have not been challenged by the United States.

The Court observes further that the United States has, however, questioned whether some of these individuals were not also United States nationals. Thus, the United States has informed the Court that, "in the case of defendant Ayala (case No. 2) we are close to certain that Ayala is a United States citizen", and that this could be confirmed with absolute certainty if Mexico produced facts about this matter. Similarly Mr. Avena (case No. 1) was said to be "likely" to be a United States citizen, and there was "some possibility" that some 16 other defendants were United States citizens. As to six others, the United States said it "cannot rule out the possibility" of United States nationality. The Court takes the view that it was for the United States to demonstrate that this was so and to furnish the Court with all information on the matter in its possession. In so far as relevant data on that matter are said by the United States to lie within the knowledge of Mexico, it was for the United States to have

sought that information from the Mexican authorities. The Court cannot accept that, because such information may have been in part in the hands of Mexico, it was for Mexico to produce such information. It was for the United States to seek such information, with sufficient specificity, and to demonstrate both that this was done and that the Mexican authorities declined or failed to respond to such specific requests. At no stage, however, has the United States shown the Court that it made specific enquiries of those authorities about particular cases and that responses were not forthcoming. The Court accordingly concludes that the United States has not met its burden of proof in its attempt to show that persons of Mexican nationality were also United States nationals.

The Court therefore finds that, as regards the 52 persons listed in paragraph 16 above, the United States had obligations under Article 36, paragraph 1 *(b)*.

58. Mexico asks the Court to find that

> "the obligation in Article 36, paragraph 1, of the Vienna Convention requires notification of consular rights and a reasonable opportunity for consular access before the competent authorities of the receiving State take any action potentially detrimental to the foreign national's rights".

59. Mexico contends that, in each of the 52 cases before the Court, the United States failed to provide the arrested persons with information as to their rights under Article 36, paragraph 1 *(b)*, "without delay". It alleges that in one case, Mr. Esquivel (case No. 7), the arrested person was informed, but only some 18 months after the arrest, while in another, that of Mr. Juárez (case No. 10), information was given to the arrested person of his rights some 40 hours after arrest. Mexico contends that this still constituted a violation, because "without delay" is to be understood as meaning "immediately", and in any event before any interrogation occurs. Mexico further draws the Court's attention to the fact that in this case a United States court found that there had been a violation of Article 36, paragraph 1 *(b)*, and claims that the United States cannot disavow such a determination by its own courts. In an Annex to its Memorial, Mexico mentions that, in a third case (Mr. Ayala, case No. 2), the accused was informed of his rights upon his arrival on death row, some four years after arrest. Mexico contends that in the remaining cases the Mexicans concerned were in fact never so informed by the United States authorities.

60. The United States disputes both the facts as presented by Mexico and the legal analysis of Article 36, paragraph 1 *(b)*, of the Vienna Convention offered by Mexico. The United States claims that Mr. Solache (case No. 47) was informed of his rights under the Vienna Convention

some seven months after his arrest. The United States further claims that many of the persons concerned were of United States nationality and that at least seven of these individuals "appear to have affirmatively claimed to be United States citizens at the time of their arrest". These cases were said to be those of Avena (case No. 1), Ayala (case No. 2), Benavides (case No. 3), Ochoa (case No. 18), Salcido (case No. 22), Tafoya (case No. 24), and Alvarez (case No. 30). In the view of the United States no duty of consular information arose in these cases. Further, in the contention of the United States, in the cases of Mr. Ayala (case No. 2) and Mr. Salcido (case No. 22) there was no reason to believe that the arrested persons were Mexican nationals at any stage; the information in the case of Mr. Juárez (case No. 10) was given "without delay".

61. The Court thus now turns to the interpretation of Article 36, paragraph 1 *(b)*, having found in paragraph 57 above that it is applicable to the 52 persons listed in paragraph 16. It begins by noting that Article 36, paragraph 1 *(b)*, contains three separate but interrelated elements: the right of the individual concerned to be informed without delay of his rights under Article 36, paragraph 1 *(b)*; the right of the consular post to be notified without delay of the individual's detention, if he so requests; and the obligation of the receiving State to forward without delay any communication addressed to the consular post by the detained person.

62. The third element of Article 36, paragraph 1 *(b)*, has not been raised on the facts before the Court. The Court thus begins with the right of an arrested or detained individual to information.

63. The Court finds that the duty upon the detaining authorities to give the Article 36, paragraph 1 *(b)*, information to the individual arises once it is realized that the person is a foreign national, or once there are grounds to think that the person is probably a foreign national. Precisely when this may occur will vary with circumstances. The United States Department of State booklet, *Consular Notification and Access — Instructions for Federal, State and Local Law Enforcement and Other Officials Regarding Foreign Nationals in the United States and the Rights of Consular Officials to Assist Them*, issued to federal, state and local authorities in order to promote compliance with Article 36 of the Vienna Convention points out in such cases that: "most, but not all, persons born outside the United States are not [citizens]. Unfamiliarity with English may also indicate foreign nationality." The Court notes that when an arrested person himself claims to be of United States nationality, the realization by the authorities that he is not in fact a United States national, or grounds for that realization, is likely to come somewhat later in time.

64. The United States has told the Court that millions of aliens reside, either legally or illegally, on its territory, and moreover that its laws concerning citizenship are generous. The United States has also pointed out that it is a multicultural society, with citizenship being held by persons of diverse appearance, speaking many languages. The Court appreciates that in the United States the language that a person speaks, or his appearance, does not necessarily indicate that he is a foreign national. Nevertheless, and particularly in view of the large numbers of foreign nationals living in the United States, these very circumstances suggest that it would be desirable for enquiry routinely to be made of the individual as to his nationality upon his detention, so that the obligations of the Vienna Convention may be complied with. The United States has informed the Court that some of its law enforcement authorities do routinely ask persons taken into detention whether they are United States citizens. Indeed, were each individual to be told at that time that, should he be a foreign national, he is entitled to ask for his consular post to be contacted, compliance with this requirement under Article 36, paragraph 1 *(b)*, would be greatly enhanced. The provision of such information could parallel the reading of those rights of which any person taken into custody in connection with a criminal offence must be informed prior to interrogation by virtue of what in the United States is known as the "Miranda rule"; these rights include, *inter alia*, the right to remain silent, the right to have an attorney present during questioning, and the right to have an attorney appointed at government expense if the person cannot afford one. The Court notes that, according to the United States, such a practice in respect of the Vienna Convention rights is already being followed in some local jurisdictions.

65. Bearing in mind the complexities explained by the United States, the Court now begins by examining the application of Article 36, paragraph 1 *(b)*, of the Vienna Convention to the 52 cases. In 45 of these cases, the Court has no evidence that the arrested persons claimed United States nationality, or were reasonably thought to be United States nationals, with specific enquiries being made in timely fashion to verify such dual nationality. The Court has explained in paragraph 57 above what enquiries it would have expected to have been made, within a short time period, and what information should have been provided to the Court.

66. Seven persons, however, are asserted by the United States to have stated at the time of arrest that they were United States citizens. Only in the case of Mr. Salcido (case No. 22) has the Court been provided by the United States with evidence of such a statement. This has been acknowledged by Mexico. Further, there has been no evidence before the Court to suggest that there were in this case at the same time also indications of Mexican nationality, which should have caused rapid enquiry by the arresting authorities and the providing of consular information "without delay". Mexico has accordingly not shown that in

the case of Mr. Salcido the United States violated its obligations under Article 36, paragraph 1 *(b)*.

67. In the case of Mr. Ayala (case No. 2), while he was identified in a court record in 1989 (three years after his arrest) as a United States citizen, there is no evidence to show this Court that the accused did indeed claim upon his arrest to be a United States citizen. The Court has not been informed of any enquiries made by the United States to confirm these assertions of United States nationality.

68. In the five other cases listed by the United States as cases where the individuals "appear to have affirmatively claimed to be United States citizens at the time of their arrest", no evidence has been presented that such a statement was made at the time of arrest.

69. Mr. Avena (case No. 1) is listed in his arrest report as having been born in California. His prison records describe him as of Mexican nationality. The United States has not shown the Court that it was engaged in enquiries to confirm United States nationality.

70. Mr. Benavides (case No. 3) was carrying an Immigration and Naturalization Service immigration card at the time of arrest in 1991. The Court has not been made aware of any reason why the arresting authorities should nonetheless have believed at the time of arrest that he was a United States national. The evidence that his defence counsel in June 1993 informed the court that Mr. Benavides had become a United States citizen is irrelevant to what was understood as to his nationality at time of arrest.

71. So far as Mr. Ochoa is concerned (case No. 18), the Court observes that his arrest report in 1990 refers to him as having been born in Mexico, an assertion that is repeated in a second police report. Some two years later details in his court record refer to him as a United States citizen born in Mexico. The Court is not provided with any further details. The United States has not shown this Court that it was aware of, or was engaged in active enquiry as to, alleged United States nationality at the time of his arrest.

72. Mr. Tafoya (case No. 24) was listed on the police booking sheet as having been born in Mexico. No further information is provided by the United States as to why this was done and what, if any, further enquiries were being made concerning the defendant's nationality.

73. Finally, the last of the seven persons referred to by the United States in this group, Mr. Alvarez (case No. 30), was arrested in Texas on 20 June 1998. Texas records identified him as a United States citizen. Within three days of his arrest, however, the Texas authorities were

informed that the Immigration and Naturalization Service was holding investigations to determine whether, because of a previous conviction, Mr. Alvarez was subject to deportation as a foreign national. The Court has not been presented with evidence that rapid resolution was sought as to the question of Mr. Alvarez's nationality.

74. The Court concludes that Mexico has failed to prove the violation by the United States of its obligations under Article 36, paragraph 1 *(b)*, in the case of Mr. Salcido (case No. 22), and his case will not be further commented upon. On the other hand, as regards the other individuals who are alleged to have claimed United States nationality on arrest, whose cases have been considered in paragraphs 67 to 73 above, the argument of the United States cannot be upheld.

75. The question nonetheless remains as to whether, in each of the 45 cases referred to in paragraph 65 and of the six cases mentioned in paragraphs 67 to 73, the United States did provide the required information to the arrested persons "without delay". It is to that question that the Court now turns.

76. The Court has been provided with declarations from a number of the Mexican nationals concerned that attest to their never being informed of their rights under Article 36, paragraph 1 *(b)*. The Court at the outset notes that, in 47 such cases, the United States nowhere challenges this fact of information not being given. Nevertheless, in the case of Mr. Hernández (case No. 34), the United States observes that

> "Although the [arresting] officer did not ask Hernández Llanas whether he wanted them to inform the Mexican Consulate of his arrest, it was certainly not unreasonable for him to assume that an escaped convict would not want the Consulate of the country from which he escaped notified of his arrest."

The Court notes that the clear duty to provide consular information under Article 36, paragraph 1 *(b)*, does not invite assumptions as to what the arrested person might prefer, as a ground for not informing him. It rather gives the arrested person, once informed, the right to say he nonetheless does not wish his consular post to be notified. It necessarily follows that in each of these 47 cases, the duty to inform "without delay" has been violated.

77. In four cases, namely Ayala (case No. 2), Esquivel (case No. 7), Juárez (case No. 10) and Solache (case No. 47), some doubts remain as to whether the information that was given was provided without delay. For these, some examination of the term is thus necessary.

78. This is a matter on which the Parties have very different views.

According to Mexico, the timing of the notice to the detained person "is critical to the exercise of the rights provided by Article 36" and the phrase "without delay" in paragraph 1 *(b)* requires "unqualified immediacy". Mexico further contends that, in view of the object and purpose of Article 36, which is to enable "meaningful consular assistance" and the safeguarding of the vulnerability of foreign nationals in custody,

> "consular notification . . . must occur immediately upon detention and prior to any interrogation of the foreign detainee, so that the consul may offer useful advice about the foreign legal system and provide assistance in obtaining counsel before the foreign national makes any ill-informed decisions or the State takes any action potentially prejudicial to his rights".

79. Thus, in Mexico's view, it would follow that in any case in which a foreign national was interrogated before being informed of his rights under Article 36, there would *ipso facto* be a breach of that Article, however rapidly after the interrogation the information was given to the foreign national. Mexico accordingly includes the case of Mr. Juárez among those where it claims violation of Article 36, paragraph 1 *(b)*, as he was interrogated before being informed of his consular rights, some 40 hours after arrest.

80. Mexico has also invoked the *travaux préparatoires* of the Vienna Convention in support of its interpretation of the requirement that the arrested person be informed "without delay" of the right to ask that the consular post be notified. In particular, Mexico recalled that the phrase proposed to the Conference by the International Law Commission, "without undue delay", was replaced by the United Kingdom proposal to delete the word "undue". The United Kingdom representative had explained that this would avoid the implication that "some delay was permissible" and no delegate had expressed dissent with the USSR and Japanese statements that the result of the amendment would be to require information "immediately".

81. The United States disputed this interpretation of the phrase "without delay". In its view it did not mean "immediately, and before interrogation" and such an understanding was supported neither by the terminology, nor by the object and purpose of the Vienna Convention, nor by its *travaux préparatoires*. In the booklet referred to in paragraph 63 above, the State Department explains that "without delay" means "there should be no deliberate delay" and that the required action should be taken "as soon as reasonably possible under the circumstances". It was normally to be expected that "notification to consular officers" would have been made "within 24 to 72 hours of the arrest or detention". The United States further contended that such an interpretation of the words "without delay" would be reasonable in itself and also allow a consistent

interpretation of the phrase as it occurs in each of three different occasions in Article 36, paragraph 1 *(b)*. As for the *travaux préparatoires*, they showed only that undue or deliberate delay had been rejected as unacceptable.

82. According to the United States, the purpose of Article 36 was to facilitate the exercise of consular functions by a consular officer:

> "The significance of giving consular information to a national is thus limited . . . It is a procedural device that allows the foreign national to trigger the related process of notification . . . [It] cannot possibly be fundamental to the criminal justice process."

83. The Court now addresses the question of the proper interpretation of the expression "without delay" in the light of arguments put to it by the Parties. The Court begins by noting that the precise meaning of "without delay", as it is to be understood in Article 36, paragraph 1 *(b)*, is not defined in the Convention. This phrase therefore requires interpretation according to the customary rules of treaty interpretation reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties.

84. Article 1 of the Vienna Convention on Consular Relations, which defines certain of the terms used in the Convention, offers no definition of the phrase "without delay". Moreover, in the different language versions of the Convention various terms are employed to render the phrases "without delay" in Article 36 and "immediately" in Article 14. The Court observes that dictionary definitions, in the various languages of the Vienna Convention, offer diverse meanings of the term "without delay" (and also of "immediately"). It is therefore necessary to look elsewhere for an understanding of this term.

85. As for the object and purpose of the Convention, the Court observes that Article 36 provides for consular officers to be free to communicate with nationals of the sending State, to have access to them, to visit and speak with them and to arrange for their legal representation. It is not envisaged, either in Article 36, paragraph 1, or elsewhere in the Convention, that consular functions entail a consular officer himself or herself acting as the legal representative or more directly engaging in the criminal justice process. Indeed, this is confirmed by the wording of Article 36, paragraph 2, of the Convention. Thus, neither the terms of the Convention as normally understood, nor its object and purpose, suggest that "without delay" is to be understood as "immediately upon arrest and before interrogation".

86. The Court further notes that, notwithstanding the uncertainties in the *travaux préparatoires*, they too do not support such an interpreta-

tion. During the diplomatic conference, the conference's expert, former Special Rapporteur of the International Law Commission, explained to the delegates that the words "without undue delay" had been introduced by the Commission, after long discussion in both the plenary and drafting committee, to allow for special circumstances which might permit information as to consular notification not to be given at once. Germany, the only one of two States to present an amendment, proposed adding "but at latest within one month". There was an extended discussion by many different delegates as to what such outer time-limit would be acceptable. During that debate no delegate proposed "immediately". The shortest specific period suggested was by the United Kingdom, namely "promptly" and no later than "48 hours" afterwards. Eventually, in the absence of agreement on a precise time period, the United Kingdom's other proposal to delete the word "undue" was accepted as the position around which delegates could converge. It is also of interest that there is no suggestion in the *travaux* that the phrase "without delay" might have different meanings in each of the three sets of circumstances in which it is used in Article 36, paragraph 1 *(b)*.

87. The Court thus finds that "without delay" is not necessarily to be interpreted as "immediately" upon arrest. It further observes that during the Conference debates on this term, no delegate made any connection with the issue of interrogation. The Court considers that the provision in Article 36, paragraph 1 *(b)*, that the receiving State authorities "shall inform the person concerned without delay of his rights" cannot be interpreted to signify that the provision of such information must necessarily precede any interrogation, so that the commencement of interrogation before the information is given would be a breach of Article 36.

88. Although, by application of the usual rules of interpretation, "without delay" as regards the duty to inform an individual under Article 36, paragraph 1 *(b)*, is not to be understood as necessarily meaning "immediately upon arrest", there is nonetheless a duty upon the arresting authorities to give that information to an arrested person as soon as it is realized that the person is a foreign national, or once there are grounds to think that the person is probably a foreign national.

89. With one exception, no information as to entitlement to consular notification was given in any of the cases cited in paragraph 77 within any of the various time periods suggested by the delegates to the Conference on the Vienna Convention, or by the United States itself (see paragraphs 81 and 86 above). Indeed, the information was given either not at all or at periods very significantly removed from the time of arrest. In the case of Mr. Juárez (case No. 10), the defendant was informed of his

consular rights 40 hours after his arrest. The Court notes, however, that Mr. Juárez's arrest report stated that he had been born in Mexico; moreover, there had been indications of his Mexican nationality from the time of his initial interrogation by agents of the Federal Bureau of Investigation (FBI) following his arrest. It follows that Mr. Juárez's Mexican nationality was apparent from the outset of his detention by the United States authorities. In these circumstances, in accordance with its interpretation of the expression "without delay" (see paragraph 88 above), the Court concludes that the United States violated the obligation incumbent upon it under Article 36, paragraph 1 *(b)*, to inform Mr. Juárez without delay of his consular rights. The Court notes that the same finding was reached by a California Superior Court, albeit on different grounds.

90. The Court accordingly concludes that, with respect to each of the individuals listed in paragraph 16, with the exception of Mr. Salcido (case No. 22; see paragraph 74 above), the United States has violated its obligation under Article 36, paragraph 1 *(b)*, of the Vienna Convention to provide information to the arrested person.

91. As noted above, Article 36, paragraph 1 *(b)*, contains three elements. Thus far, the Court has been dealing with the right of an arrested person to be informed that he may ask for his consular post to be notified. The Court now turns to another aspect of Article 36, paragraph 1 *(b)*. The Court finds the United States is correct in observing that the fact that a Mexican consular post was not notified under Article 36, paragraph 1 *(b)*, does not of necessity show that the arrested person was not informed of his rights under that provision. He may have been informed and declined to have his consular post notified. The giving of the information is relevant, however, for satisfying the element in Article 36, paragraph 1 *(b)*, on which the other two elements therein depend.

92. In only two cases has the United States claimed that the arrested person was informed of his consular rights but asked for the consular post not to be notified. These are Mr. Juárez (case No. 10) and Mr. Solache (case No. 47).

93. The Court is satisfied that when Mr. Juárez (case No. 10) was informed of his consular rights 40 hours after his arrest (see paragraph 89) he chose not to have his consular post notified. As regards Mr. Solache (case No. 47), however, it is not sufficiently clear to the Court, on the evidence before it, that he requested that his consular post should not be notified. Indeed, the Court has not been provided with any reasons as to why, if a request of non-notification was made, the consular post was then notified some three months later.

94. In a further three cases, the United States alleges that the consular post was formally notified of the detention of one of its Mexican

nationals without prior information to the individual as to his consular rights. These are Mr. Covarrubias (case No. 6), Mr. Hernández (case No. 34) and Mr. Reyes (case No. 54). The United States further contends that the Mexican authorities were contacted regarding the case of Mr. Loza (case No. 52).

95. The Court notes that, in the case of Mr. Covarrubias (case No. 6), the consular authorities learned from third parties of his arrest shortly after it occurred. Some 16 months later, a court-appointed interpreter requested that the consulate intervene in the case prior to trial. It would appear doubtful whether an interpreter can be considered a competent authority for triggering the interrelated provisions of Article 36, paragraph 1 *(b)*, of the Vienna Convention. In the case of Mr. Reyes (case No. 54), the United States has simply told the Court that an Oregon Department of Justice attorney had advised United States authorities that both the District Attorney and the arresting detective advised the Mexican consular authorities of his arrest. No information is given as to when this occurred, in relation to the date of his arrest. Mr. Reyes did receive assistance before his trial. In these two cases, the Court considers that, even on the hypothesis that the conduct of the United States had no serious consequences for the individuals concerned, it did nonetheless constitute a violation of the obligations incumbent upon the United States under Article 36, paragraph 1 *(b)*.

96. In the case of Mr. Loza (case No. 52), a United States Congressman from Ohio contacted the Mexican Embassy on behalf of Ohio prosecutors, some four months after the accused's arrest, "to enquire about the procedures for obtaining a certified copy of Loza's birth certificate". The Court has not been provided with a copy of the Congressman's letter and is therefore unable to ascertain whether it explained that Mr. Loza had been arrested. The response from the Embassy (which is also not included in the documentation provided to the Court) was passed by the Congressman to the prosecuting attorney, who then asked the Civil Registry of Guadalajara for a copy of the birth certificate. This request made no specific mention of Mr. Loza's arrest. Mexico contends that its consulate was never formally notified of Mr. Loza's arrest, of which it only became aware after he had been convicted and sentenced to death. Mexico includes the case of Mr. Loza among those in which the United States was in breach of its obligation of consular notification. Taking account of all these elements, and in particular of the fact that the Embassy was contacted four months after the arrest, and that the consular post became aware of the defendant's detention only after he had been convicted and sentenced, the Court concludes that in the case of Mr. Loza the United States violated the obligation of consular notification without delay incumbent upon it under Article 36, paragraph 1 *(b)*.

97. Mr. Hernández (case No. 34) was arrested in Texas on Wednesday 15 October 1997. The United States authorities had no reason to believe he might have American citizenship. The consular post was notified the following Monday, that is five days (corresponding to only three working days) thereafter. The Court finds that, in the circumstances, the United States did notify the consular post without delay, in accordance with its obligation under Article 36, paragraph 1 *(b)*.

98. In the first of its final submissions, Mexico also asks the Court to find that the violations it ascribes to the United States in respect of Article 36, paragraph 1 *(b)*, have also deprived "Mexico of its right to provide consular protection and the 52 nationals' right to receive such protection as Mexico would provide under Article 36 (1) *(a)* and *(c)* of the Convention".

99. The relationship between the three subparagraphs of Article 36, paragraph 1, has been described by the Court in its Judgment in the *LaGrand* case (*I.C.J. Reports 2001*, p. 492, para. 74) as "an interrelated régime". The legal conclusions to be drawn from that interrelationship necessarily depend upon the facts of each case. In the *LaGrand* case, the Court found that the failure for 16 years to inform the brothers of their right to have their consul notified effectively prevented the exercise of other rights that Germany might have chosen to exercise under subparagraphs *(a)* and *(c)*.

100. It is necessary to revisit the interrelationship of the three subparagraphs of Article 36, paragraph 1, in the light of the particular facts and circumstances of the present case.

101. The Court would first recall that, in the case of Mr. Juárez (case No. 10) (see paragraph 93 above), when the defendant was informed of his rights, he declined to have his consular post notified. Thus in this case there was no violation of either subparagraph *(a)* or subparagraph *(c)* of Article 36, paragraph 1.

102. In the remaining cases, because of the failure of the United States to act in conformity with Article 36, paragraph 1 *(b)*, Mexico was in effect precluded (in some cases totally, and in some cases for prolonged periods of time) from exercising its right under paragraph 1 *(a)* to communicate with its nationals and have access to them. As the Court has already had occasion to explain, it is immaterial whether Mexico would have offered consular assistance, "or whether a different verdict would have been rendered. It is sufficient that the Convention conferred these rights" (*I.C.J. Reports 2001*, p. 492, para. 74), which might have been acted upon.

103. The same is true, *pari passu*, of certain rights identified in subparagraph *(c)*: "consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, and to converse and correspond with him . . .".

104. On the other hand, and on the particular facts of this case, no such generalized answer can be given as regards a further entitlement mentioned in subparagraph *(c)*, namely, the right of consular officers "to arrange for [the] legal representation" of the foreign national. Mexico has laid much emphasis in this litigation upon the importance of consular officers being able to arrange for such representation before and during trial, and especially at sentencing, in cases in which a severe penalty may be imposed. Mexico has further indicated the importance of any financial or other assistance that consular officers may provide to defence counsel, *inter alia* for investigation of the defendant's family background and mental condition, when such information is relevant to the case. The Court observes that the exercise of the rights of the sending State under Article 36, paragraph 1 *(c)*, depends upon notification by the authorities of the receiving State. It may be, however, that information drawn to the attention of the sending State by other means may still enable its consular officers to assist in arranging legal representation for its national. In the following cases, the Mexican consular authorities learned of their national's detention in time to provide such assistance, either through notification by United States authorities (albeit belatedly in terms of Article 36, paragraph 1 *(b)*) or through other channels: Benavides (case No. 3); Covarrubias (case No. 6); Esquivel (case No. 7); Hoyos (case No. 9); Mendoza (case No. 17); Ramírez (case No. 20); Sánchez (case No. 23); Verano (case No. 27); Zamudio (case No. 29); Gómez (case No. 33); Hernández (case No. 34); Ramirez (case No. 41); Rocha (case No. 42); Solache (case No. 47); Camargo (case No. 49) and Reyes (case No. 54).

105. In relation to Mr. Manríquez (case No. 14), the Court lacks precise information as to when his consular post was notified. It is merely given to understand that it was two years prior to conviction, and that Mr. Manríquez himself had never been informed of his consular rights. There is also divergence between the Parties in regard to the case of Mr. Fuentes (case No. 15), where Mexico claims it became aware of his detention during trial and the United States says this occurred during jury selection, prior to the actual commencement of the trial. In the case of Mr. Arias (case No. 44), the Mexican authorities became aware of his detention less than one week before the commencement of the trial. In those three cases, the Court concludes that the United States violated its obligations under Article 36, paragraph 1 *(c)*.

106. On this aspect of the case, the Court thus concludes:

(1) that the United States committed breaches of the obligation incumbent upon it under Article 36, paragraph 1 *(b)*, of the Vienna Convention to inform detained Mexican nationals of their rights under

that paragraph, in the case of the following 51 individuals: Avena (case No. 1), Ayala (case No. 2), Benavides (case No. 3), Carrera (case No. 4), Contreras (case No. 5), Covarrubias (case No. 6), Esquivel (case No. 7), Gómez (case No. 8), Hoyos (case No. 9), Juárez (case No. 10), López (case No. 11), Lupercio (case No. 12), Maciel (case No. 13), Manríquez (case No. 14), Fuentes (case No. 15), Martínez (case No. 16), Mendoza (case No. 17), Ochoa (case No. 18), Parra (case No. 19), Ramírez (case No. 20), Salazar (case No. 21), Sánchez (case No. 23), Tafoya (case No. 24), Valdez (case No. 25), Vargas (case No. 26), Verano (case No. 27), Zamudio (case No. 29), Alvarez (case No. 30), Fierro (case No. 31), García (case No. 32), Gómez (case No. 33), Hernández (case No. 34), Ibarra (case No. 35), Leal (case No. 36), Maldonado (case No. 37), Medellín (case No. 38), Moreno (case No. 39), Plata (case No. 40), Ramírez (case No. 41), Rocha (case No. 42), Regalado (case No. 43), Arias (case No. 44), Caballero (case No. 45), Flores (case No. 46), Solache (case No. 47), Fong (case No. 48), Camargo (case No. 49), Pérez (case No. 51), Loza (case No. 52), Torres (case No. 53) and Reyes (case No. 54);

(2) that the United States committed breaches of the obligation incumbent upon it under Article 36, paragraph 1 *(b)*, to notify the Mexican consular post of the detention of the Mexican nationals listed in subparagraph (1) above, except in the cases of Mr. Juárez (No. 10) and Mr. Hernández (No. 34);

(3) that by virtue of its breaches of Article 36, paragraph 1 *(b)*, as described in subparagraph (2) above, the United States also violated the obligation incumbent upon it under Article 36, paragraph 1 *(a)*, of the Vienna Convention to enable Mexican consular officers to communicate with and have access to their nationals, as well as its obligation under paragraph 1 *(c)* of that Article regarding the right of consular officers to visit their detained nationals;

(4) that the United States, by virtue of these breaches of Article 36, paragraph 1 *(b)*, also violated the obligation incumbent upon it under paragraph 1 *(c)* of that Article to enable Mexican consular officers to arrange for legal representation of their nationals in the case of the following individuals: Avena (case No. 1), Ayala (case No. 2), Carrera (case No. 4), Contreras (case No. 5), Gómez (case No. 8), López (case No. 11), Lupercio (case No. 12), Maciel (case No. 13), Manríquez (case No. 14), Fuentes (case No. 15), Martínez (case No. 16), Ochoa (case No. 18), Parra (case No. 19), Salazar (case No. 21), Tafoya (case No. 24), Valdez (case No. 25), Vargas (case No. 26), Alvarez (case No. 30), Fierro (case No. 31), García (case No. 32), Ibarra (case No. 35), Leal (case No. 36), Maldonado (case No. 37), Medellín (case No. 38), Moreno (case No. 39), Plata (case No. 40), Regalado (case No. 43), Arias (case No. 44), Caballero (case No. 45),

Flores (case No. 46), Fong (case No. 48), Pérez (case No. 51), Loza (case No. 52) and Torres (case No. 53).

*

ARTICLE 36, PARAGRAPH 2

107. In its third final submission Mexico asks the Court to adjudge and declare that

> "the United States violated its obligations under Article 36 (2) of the Vienna Convention by failing to provide meaningful and effective review and reconsideration of convictions and sentences impaired by a violation of Article 36 (1)".

108. Article 36, paragraph 2, provides:

> "The rights referred to in paragraph 1 of this article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this article are intended."

109. In this connection, Mexico has argued that the United States

> "By applying provisions of its municipal law to defeat or foreclose remedies for the violation of rights conferred by Article 36 — thus failing to provide meaningful review and reconsideration of severe sentences imposed in proceedings that violated Article 36 — . . . has violated, and continues to violate, the Vienna Convention."

More specifically, Mexico contends that:

> "The United States uses several municipal legal doctrines to prevent finding any legal effect from the violations of Article 36. *First*, despite this Court's clear analysis in *LaGrand*, US courts, at both the state and federal level, continue to invoke default doctrines to bar any review of Article 36 violations — even when the national had been unaware of his rights to consular notification and communication and thus his ability to raise their violation as an issue at trial, due to the competent authorities' failure to comply with Article 36."

110. Against this contention by Mexico, the United States argues that:

"the criminal justice systems of the United States address all errors

in process through both judicial and executive clemency proceedings, relying upon the latter when rules of default have closed out the possibility of the former. That is, the 'laws and regulations' of the United States provide for the correction of mistakes that may be relevant to a criminal defendant to occur through a combination of judicial review and clemency. These processes together, working with other competent authorities, give full effect to the purposes for which Article 36 (1) is intended, in conformity with Article 36 (2). And, insofar as a breach of Article 36 (1) has occurred, these procedures satisfy the remedial function of Article 36 (2) by allowing the United States to provide review and reconsideration of convictions and sentences consistent with *LaGrand*."

111. The "procedural default" rule in United States law has already been brought to the attention of the Court in the *LaGrand* case. The following brief definition of the rule was provided by Mexico in its Memorial in this case and has not been challenged by the United States: "a defendant who could have raised, but fails to raise, a legal issue at trial will generally not be permitted to raise it in future proceedings, on appeal or in a petition for a writ of *habeas corpus*". The rule requires exhaustion of remedies, *inter alia*, at the state level and before a *habeas corpus* motion can be filed with federal courts. In the *LaGrand* case, the rule in question was applied by United States federal courts; in the present case, Mexico also complains of the application of the rule in certain state courts of criminal appeal.

112. The Court has already considered the application of the "procedural default" rule, alleged by Mexico to be a hindrance to the full implementation of the international obligations of the United States under Article 36, in the *LaGrand* case, when the Court addressed the issue of its implications for the application of Article 36, paragraph 2, of the Vienna Convention. The Court emphasized that "a distinction must be drawn between that rule as such and its specific application in the present case". The Court stated:

"In itself, the rule does not violate Article 36 of the Vienna Convention. The problem arises when the procedural default rule does not allow the detained individual to challenge a conviction and sentence by claiming, in reliance on Article 36, paragraph 1, of the Convention, that the competent national authorities failed to comply with their obligation to provide the requisite consular information 'without delay', thus preventing the person from seeking and obtaining consular assistance from the sending State." (*I.C.J. Reports 2001*, p. 497, para. 90.)

On this basis, the Court concluded that "the procedural default rule prevented counsel for the LaGrands to effectively challenge their convictions and sentences other than on United States constitutional grounds" (*I.C.J. Reports 2001*, p. 497, para. 91). This statement of the Court seems equally valid in relation to the present case, where a number of Mexican nationals have been placed exactly in such a situation.

113. The Court will return to this aspect below, in the context of Mexico's claims as to remedies. For the moment, the Court simply notes that the procedural default rule has not been revised, nor has any provision been made to prevent its application in cases where it has been the failure of the United States itself to inform that may have precluded counsel from being in a position to have raised the question of a violation of the Vienna Convention in the initial trial. It thus remains the case that the procedural default rule may continue to prevent courts from attaching legal significance to the fact, *inter alia*, that the violation of the rights set forth in Article 36, paragraph 1, prevented Mexico, in a timely fashion, from retaining private counsel for certain nationals and otherwise assisting in their defence. In such cases, application of the procedural default rule would have the effect of preventing "full effect [from being] given to the purposes for which the rights accorded under this article are intended", and thus violate paragraph 2 of Article 36. The Court notes moreover that in several of the cases cited in Mexico's final submissions the procedural default rule has already been applied, and that in others it could be applied at subsequent stages in the proceedings. However, in none of the cases, save for the three mentioned in paragraph 114 below, have the criminal proceedings against the Mexican nationals concerned already reached a stage at which there is no further possibility of judicial re-examination of those cases; that is to say, all possibility is not yet excluded of "review and reconsideration" of conviction and sentence, as called for in the *LaGrand* case, and as explained further in paragraphs 128 and following below. It would therefore be premature for the Court to conclude at this stage that, in those cases, there is already a violation of the obligations under Article 36, paragraph 2, of the Vienna Convention.

114. By contrast, the Court notes that in the case of three Mexican nationals, Mr. Fierro (case No. 31), Mr. Moreno (case No. 39), and Mr. Torres (case No. 53), conviction and sentence have become final. Moreover, in the case of Mr. Torres the Oklahoma Court of Criminal Appeals has set an execution date (see paragraph 21 above, *in fine*). The Court must therefore conclude that, in relation to these three individuals, the United States is in breach of the obligations incumbent upon it under Article 36, paragraph 2, of the Vienna Convention.

* *

LEGAL CONSEQUENCES OF THE BREACH

115. Having concluded that in most of the cases brought before the Court by Mexico in the 52 instances, there has been a failure to observe the obligations prescribed by Article 36, paragraph 1 *(b)*, of the Vienna Convention, the Court now proceeds to the examination of the legal consequences of such a breach and of what legal remedies should be considered for the breach.

116. Mexico in its fourth, fifth and sixth submissions asks the Court to adjudge and declare:

> "(4) that pursuant to the injuries suffered by Mexico in its own right and in the exercise of diplomatic protection of its nationals, Mexico is entitled to full reparation for these injuries in the form of *restitutio in integrum*;
>
> (5) that this restitution consists of the obligation to restore the *status quo ante* by annulling or otherwise depriving of full force or effect the conviction and sentences of all 52 Mexican nationals; [and]
>
> (6) that this restitution also includes the obligation to take all measures necessary to ensure that a prior violation of Article 36 shall not affect the subsequent proceedings."

117. In support of its fourth and fifth submissions, Mexico argues that "It is well-established that the primary form of reparation available to a State injured by an internationally wrongful act is *restitutio in integrum*", and that "The United States is therefore obliged to take the necessary action to restore the *status quo ante* in respect of Mexico's nationals detained, tried, convicted and sentenced in violation of their internationally recognized rights." To restore the *status quo ante*, Mexico contends that "restitution here must take the form of annulment of the convictions and sentences that resulted from the proceedings tainted by the Article 36 violations", and that "It follows from the very nature of *restitutio* that, when a violation of an international obligation is manifested in a judicial act, that act must be annulled and thereby deprived of any force or effect in the national legal system." Mexico therefore asks in its submissions that the convictions and sentences of the 52 Mexican nationals be annulled, and that, in any future criminal proceedings against these 52 Mexican nationals, evidence obtained in breach of Article 36 of the Vienna Convention be excluded.

118. The United States on the other hand argues:

> "*LaGrand*'s holding calls for the United States to provide, in each case, 'review and reconsideration' that 'takes account of' the viola-

tion, not 'review and reversal', not across-the-board exclusions of evidence or nullification of convictions simply because a breach of Article 36 (1) occurred and without regard to its effect upon the conviction and sentence and, not . . . 'a precise, concrete, stated result: to re-establish the *status quo ante*' ".

119. The general principle on the legal consequences of the commission of an internationally wrongful act was stated by the Permanent Court of International Justice in the *Factory at Chorzów* case as follows: "It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form." (*Factory at Chorzów, Jurisdiction, 1927, P.C.I.J., Series A, No. 9*, p. 21.) What constitutes "reparation in an adequate form" clearly varies depending upon the concrete circumstances surrounding each case and the precise nature and scope of the injury, since the question has to be examined from the viewpoint of what is the "reparation in an adequate form" that corresponds to the injury. In a subsequent phase of the same case, the Permanent Court went on to elaborate on this point as follows:

> "The essential principle contained in the actual notion of an illegal act — a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals — is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed." (*Factory at Chorzów, Merits, 1928, P.C.I.J., Series A, No. 17*, p. 47.)

120. In the *LaGrand* case the Court made a general statement on the principle involved as follows:

> "The Court considers in this respect that if the United States, notwithstanding its commitment [to ensure implementation of the specific measures adopted in performance of its obligations under Article 36, paragraph 1 *(b)*], should fail in its obligation of consular notification to the detriment of German nationals, an apology would not suffice in cases where the individuals concerned have been subjected to prolonged detention or convicted and sentenced to severe penalties. In the case of such a conviction and sentence, it would be incumbent upon the United States to allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention. This obligation can be carried out in various ways. The choice of means must be left to the United States." (*I.C.J. Reports 2001*, pp. 513-514, para. 125.)

121. Similarly, in the present case the Court's task is to determine what would be adequate reparation for the violations of Article 36. It should be clear from what has been observed above that the internationally wrongful acts committed by the United States were the failure of its

competent authorities to inform the Mexican nationals concerned, to notify Mexican consular posts and to enable Mexico to provide consular assistance. It follows that the remedy to make good these violations should consist in an obligation on the United States to permit review and reconsideration of these nationals' cases by the United States courts, as the Court will explain further in paragraphs 128 to 134 below, with a view to ascertaining whether in each case the violation of Article 36 committed by the competent authorities caused actual prejudice to the defendant in the process of administration of criminal justice.

122. The Court reaffirms that the case before it concerns Article 36 of the Vienna Convention and not the correctness as such of any conviction or sentencing. The question of whether the violations of Article 36, paragraph 1, are to be regarded as having, in the causal sequence of events, ultimately led to convictions and severe penalties is an integral part of criminal proceedings before the courts of the United States and is for them to determine in the process of review and reconsideration. In so doing, it is for the courts of the United States to examine the facts, and in particular the prejudice and its causes, taking account of the violation of the rights set forth in the Convention.

123. It is not to be presumed, as Mexico asserts, that partial or total annulment of conviction or sentence provides the necessary and sole remedy. In this regard, Mexico cites the recent Judgment of this Court in the case concerning the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium)*, in which the "Court ordered the cancellation of an arrest warrant issued by a Belgian judicial official in violation of the international immunity of the Congo Minister for Foreign Affairs". However, the present case has clearly to be distinguished from the *Arrest Warrant* case. In that case, the question of the legality under international law of the act of issuing the arrest warrant against the Congolese Minister for Foreign Affairs by the Belgian judicial authorities was itself the subject-matter of the dispute. Since the Court found that act to be in violation of international law relating to immunity, the proper legal consequence was for the Court to order the cancellation of the arrest warrant in question (*I.C.J. Reports 2002*, p. 33). By contrast, in the present case it is not the convictions and sentences of the Mexican nationals which are to be regarded as a violation of international law, but solely certain breaches of treaty obligations which preceded them.

124. Mexico has further contended that the right to consular notification and consular communication under the Vienna Convention is a fundamental human right that constitutes part of due process in criminal proceedings and should be guaranteed in the territory of each of the Contracting Parties to the Vienna Convention; according to Mexico, this

right, as such, is so fundamental that its infringement will *ipso facto* produce the effect of vitiating the entire process of the criminal proceedings conducted in violation of this fundamental right. Whether or not the Vienna Convention rights are human rights is not a matter that this Court need decide. The Court would, however, observe that neither the text nor the object and purpose of the Convention, nor any indication in the *travaux préparatoires*, support the conclusion that Mexico draws from its contention in that regard.

125. For these reasons, Mexico's fourth and fifth submissions cannot be upheld.

126. The reasoning of the Court on the fifth submission of Mexico is equally valid in relation to the sixth submission of Mexico. In elaboration of its sixth submission, Mexico contends that,

> "As an aspect of *restitutio in integrum*, Mexico is also entitled to an order that in any subsequent criminal proceedings against the nationals, statements and confessions obtained prior to notification to the national of his right to consular assistance be excluded."

Mexico argues that "The exclusionary rule applies in both common law and civil law jurisdictions and requires the exclusion of evidence that is obtained in a manner that violates due process obligations", and on this basis concludes that

> "The status of the exclusionary rule as a general principle of law permits the Court to order that the United States is obligated to apply this principle in respect of statements and confessions given to United States law enforcement officials prior to the accused Mexican nationals being advised of their consular rights in any subsequent criminal proceedings against them."

127. The Court does not consider that it is necessary to enter into an examination of the merits of the contention advanced by Mexico that the "exclusionary rule" is "a general principle of law under Article 38 (1) *(c)* of the . . . Statute" of the Court. The issue raised by Mexico in its sixth submission relates to the question of what legal consequences flow from the breach of the obligations under Article 36, paragraph 1 — a question which the Court has already sufficiently discussed above in relation to the fourth and the fifth submissons of Mexico. The Court is of the view that this question is one which has to be examined under the concrete circumstances of each case by the United States courts concerned in the process of their review and reconsideration. For this reason, the sixth submission of Mexico cannot be upheld.

128. While the Court has rejected the fourth, fifth and sixth submissions of Mexico relating to the remedies for the breaches by the United

States of its international obligations under Article 36 of the Vienna Convention, the fact remains that such breaches have been committed, as the Court has found, and it is thus incumbent upon the Court to specify what remedies are required in order to redress the injury done to Mexico and to its nationals by the United States through non-compliance with those international obligations. As has already been observed in paragraph 120, the Court in the *LaGrand* Judgment stated the general principle to be applied in such cases by way of a remedy to redress an injury of this kind (*I.C.J. Reports 2001*, pp. 513-514, para. 125).

129. In this regard, Mexico's seventh submission also asks the Court to adjudge and declare:

> "That to the extent that any of the 52 convictions or sentences are not annulled, the United States shall provide, by means of its own choosing, meaningful and effective review and reconsideration of the convictions and sentences of the 52 nationals, and that this obligation cannot be satisfied by means of clemency proceedings or if any municipal law rule or doctrine [that fails to attach legal significance to an Article 36 (1) violation] is applied."

130. On this question of "review and reconsideration", the United States takes the position that it has indeed conformed its conduct to the *LaGrand* Judgment. In a further elaboration of this point, the United States argues that "[t]he Court said in *LaGrand* that the choice of means for allowing the review and reconsideration it called for 'must be left' to the United States", but that "Mexico would not leave this choice to the United States but have the Court undertake the review instead and decide at once that the breach requires the conviction and sentence to be set aside in each case".

131. In stating in its Judgment in the *LaGrand* case that "the United States of America, *by means of its own choosing*, shall allow the review and reconsideration of the conviction and sentence" (*I.C.J. Reports 2001*, p. 516, para. 128 (7); emphasis added), the Court acknowledged that the concrete modalities for such review and reconsideration should be left primarily to the United States. It should be underlined, however, that this freedom in the choice of means for such review and reconsideration is not without qualification: as the passage of the Judgment quoted above makes abundantly clear, such review and reconsideration has to be carried out "by taking account of the violation of the rights set forth in the Convention" (*I.C.J. Reports 2001*, p. 514, para. 125), including, in particular, the question of the legal consequences of the violation upon the criminal proceedings that have followed the violation.

132. The United States argues (1) "that the Court's decision in *LaGrand* in calling for review and reconsideration called for a process to re-examine a conviction and sentence in light of a breach of Article 36"; (2) that, "in calling for a process of review, the Court necessarily implied that one legitimate result of that process might be a conclusion that the conviction and sentence should stand"; and (3) "that the relief Mexico seeks in this

case is flatly inconsistent with the Judgment in *LaGrand*: it seeks precisely the award of a substantive outcome that the *LaGrand* Court declined to provide".

133. However, the Court wishes to point out that the current situation in the United States criminal procedure, as explained by the Agent at the hearings, is that

> "If the defendant alleged at trial that *a failure of consular information resulted in harm to a particular right essential to a fair trial*, an appeals court can *review how the lower court handled that claim of prejudice*",

but that

> "*If the foreign national did not raise his Article 36 claim at trial, he may face procedural constraints* [i.e., the application of the procedural default rule] on raising that particular claim in direct or collateral judicial appeals" (emphasis added).

As a result, a claim based on the violation of Article 36, paragraph 1, of the Vienna Convention, however meritorious in itself, could be barred in the courts of the United States by the operation of the procedural default rule (see paragraph 111 above).

134. It is not sufficient for the United States to argue that "[w]hatever label [the Mexican defendant] places on his claim, his right . . . must and will be vindicated if it is raised *in some form* at trial" (emphasis added), and that

> "In that way, even though a failure to label the complaint as a breach of the Vienna Convention may mean that he has technically speaking forfeited his right to raise this issue as a Vienna Convention claim, on appeal that failure would not bar him from independently asserting *a claim that he was prejudiced because he lacked this critical protection needed for a fair trial.*" (Emphasis added.)

The crucial point in this situation is that, by the operation of the procedural default rule as it is applied at present, the defendant is effectively barred from raising the issue of the violation of his rights under Article 36 of the Vienna Convention and is limited to seeking the vindication of his rights under the United States Constitution.

*

135. Mexico, in the latter part of its seventh submission, has stated that "this obligation [of providing review and reconsideration] cannot be

satisfied by means of clemency proceedings". Mexico elaborates this point by arguing first of all that "the United States's reliance on clemency proceedings is wholly inconsistent with its obligation to provide a remedy, as that obligation was found by this Court in *LaGrand*". More specifically, Mexico contends:

> "*First*, it is clear that the Court's direction to the United States in *LaGrand* clearly contemplated that 'review and reconsideration' would be carried out by judicial procedures . . . .
>
> *Second*, the Court was fully aware that the LaGrand brothers had received a clemency hearing, during which the Arizona Pardons Board took into account the violation of their consular rights. Accordingly, the Court determined in *LaGrand* that clemency review alone did not constitute the required 'review and reconsideration' . . .
>
> *Finally*, the Court specified that 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' . . . it is a basic matter of U.S. criminal procedural law that courts review convictions; clemency panels do not. With the rare exception of pardons based on actual innocence, the focus of capital clemency review is on the propriety of the sentence and not on the underlying conviction."

Furthermore, Mexico argues that the clemency process is in itself an ineffective remedy to satisfy the international obligations of the United States. It concludes: "clemency review is standardless, secretive, and immune from judicial oversight".

Finally, in support of its contention, Mexico argues that

> "the failure of state clemency authorities to pay heed to the intervention of the US Department of State in cases of death-sentenced Mexican nationals refutes the [United States] contention that clemency review will provide meaningful consideration of the violations of rights conferred under Article 36".

136. Against this contention of Mexico, the United States claims that it "gives 'full effect' to the 'purposes for which the rights accorded under [Article 36, paragraph 1,] are intended' through executive clemency". It argues that "[t]he clemency process . . . is well suited to the task of providing review and reconsideration". The United States explains that "Clemency . . . is more than a matter of grace; it is part of the overall scheme for ensuring justice and fairness in the legal process" and that

"Clemency procedures are an integral part of the existing 'laws and regulations' of the United States through which errors are addressed".

137. Specifically in the context of the present case, the United States contends that the following two points are particularly noteworthy:

> "First, these clemency procedures allow for broad participation by advocates of clemency, including an inmate's attorney and the sending state's consular officer . . . Second, these clemency officials are not bound by principles of procedural default, finality, prejudice standards, or any other limitations on judicial review. They may consider any facts and circumstances that they deem appropriate and relevant, including specifically Vienna Convention claims."

138. The Court would emphasize that the "review and reconsideration" prescribed by it in the *LaGrand* case should be effective. Thus it should "tak[e] account of the violation of the rights set forth in [the] Convention" (*I.C.J. Reports 2001*, p. 516, para. 128 (7)) and guarantee that the violation and the possible prejudice caused by that violation will be fully examined and taken into account in the review and reconsideration process. Lastly, review and reconsideration should be both of the sentence and of the conviction.

139. Accordingly, in a situation of the violation of rights under Article 36, paragraph 1, of the Vienna Convention, the defendant raises his claim in this respect not as a case of "harm to a particular right essential to a fair trial" — a concept relevant to the enjoyment of due process rights under the United States Constitution — but as a case involving the infringement of his rights under Article 36, paragraph 1. The rights guaranteed under the Vienna Convention are treaty rights which the United States has undertaken to comply with in relation to the individual concerned, irrespective of the due process rights under United States constitutional law. In this regard, the Court would point out that what is crucial in the review and reconsideration process is the existence of a procedure which guarantees that full weight is given to the violation of the rights set forth in the Vienna Convention, whatever may be the actual outcome of such review and reconsideration.

140. As has been explained in paragraphs 128 to 134 above, the Court is of the view that, in cases where the breach of the individual rights of Mexican nationals under Article 36, paragraph 1 *(b)*, of the Convention has resulted, in the sequence of judicial proceedings that has followed, in the individuals concerned being subjected to prolonged detention or convicted and sentenced to severe penalties, the legal consequences of this breach have to be examined and taken into account in the course of

review and reconsideration. The Court considers that it is the judicial process that is suited to this task.

141. The Court in the *LaGrand* case left to the United States the choice of means as to how review and reconsideration should be achieved, especially in the light of the procedural default rule. Nevertheless, the premise on which the Court proceeded in that case was that the process of review and reconsideration should occur within the overall judicial proceedings relating to the individual defendant concerned.

142. As regards the clemency procedure, the Court notes that this performs an important function in the administration of criminal justice in the United States and is "the historic remedy for preventing miscarriages of justice where judicial process has been exhausted" (*Herrera* v. *Collins*, 506 US 390 (1993) at pp. 411-412). The Court accepts that executive clemency, while not judicial, is an integral part of the overall scheme for ensuring justice and fairness in the legal process within the United States criminal justice system. It must, however, point out that what is at issue in the present case is not whether executive clemency as an institution is or is not an integral part of the "existing laws and regulations of the United States", but whether the clemency process as practised within the criminal justice systems of different states in the United States can, in and of itself, qualify as an appropriate means for undertaking the effective "review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention", as the Court prescribed in the *LaGrand* Judgment (*I.C.J. Reports 2001*, p. 514, para. 125).

143. It may be true, as the United States argues, that in a number of cases "clemency in fact results in pardons of convictions as well as commutations of sentences". In that sense and to that extent, it might be argued that the facts demonstrated by the United States testify to a degree of effectiveness of the clemency procedures as a means of relieving defendants on death row from execution. The Court notes, however, that the clemency process, as currently practised within the United States criminal justice system, does not appear to meet the requirements described in paragraph 138 above and that it is therefore not sufficient in itself to serve as an appropriate means of "review and reconsideration" as envisaged by the Court in the *LaGrand* case. The Court considers nevertheless that appropriate clemency procedures can supplement judicial review and reconsideration, in particular where the judicial system has failed to take due account of the violation of the rights set forth in the Vienna Convention, as has occurred in the case of the three Mexican nationals referred to in paragraph 114 above.

*

144. Finally, the Court will consider the eighth submission of Mexico, in which it asks the Court to adjudge and declare:

> "That the [United States] shall cease its violations of Article 36 of the Vienna Convention with regard to Mexico and its 52 nationals and shall provide appropriate guarantees and assurances that it shall take measures sufficient to achieve increased compliance with Article 36 (1) and to ensure compliance with Article 36 (2)."

145. In this respect, Mexico recognizes the efforts by the United States to raise awareness of consular assistance rights, through the distribution of pamphlets and pocket cards and by the conduct of training programmes, and that the measures adopted by the United States to that end were noted by the Court in its decision in the *LaGrand* case (*I.C.J. Reports 2001*, pp. 511-513, paras. 121, 123-124). Mexico, however, notes with regret that

> "the United States programme, whatever its components, has proven ineffective to prevent the regular and continuing violation by its competent authorities of consular notification and assistance rights guaranteed by Article 36".

146. In particular, Mexico claims in relation to the violation of the obligations under Article 36, paragraph 1, of the Vienna Convention:

> "*First*, competent authorities of the United States regularly fail to provide the timely notification required by Article 36 (1) *(b)* and thereby to *[sic]* frustrate the communication and access contemplated by Article 36 (1) *(a)* and the assistance contemplated by Article 36 (1) *(c)*. These violations continue notwithstanding the Court's judgment in *LaGrand* and the programme described there.
>
> . . . . . .
>
> Mexico has demonstrated, moreover, that the pattern of regular non-compliance continues. During the first half of 2003, Mexico has identified at least one hundred cases in which Mexican nationals have been arrested by competent authorities of the United States for serious felonies but not timely notified of their consular notification rights."

Furthermore, in relation to the violation of the obligations under Article 36, paragraph 2, of the Vienna Convention, Mexico claims:

> "*Second*, courts in the United States continue to apply doctrines of procedural default and non-retroactivity that prevent those courts from reaching the merits of Vienna Convention claims, and those courts that have addressed the merits of those claims (because no procedural bar applies) have repeatedly held that no remedy is avail-

able for a breach of the obligations of Article 36 . . . Likewise, the United States' reliance on clemency proceedings to meet *LaGrand*'s requirement of review and reconsideration represents a deliberate decision to allow these legal rules and doctrines to continue to have their inevitable effect. Hence, the United States continues to breach Article 36 (2) by failing to give full effect to the purposes for which the rights accorded under Article 36 are intended."

147. The United States contradicts this contention of Mexico by claiming that "its efforts to improve the conveyance of information about consular notification are continuing unabated and are achieving tangible results". It contends that Mexico "fails to establish a 'regular and continuing' pattern of breaches of Article 36 in the wake of *LaGrand*".

148. Mexico emphasizes the necessity of requiring the cessation of the wrongful acts because, it alleges, the violation of Article 36 with regard to Mexico and its 52 nationals still continues. The Court considers, however, that Mexico has not established a continuing violation of Article 36 of the Vienna Convention with respect to the 52 individuals referred to in its final submissions; it cannot therefore uphold Mexico's claim seeking cessation. The Court would moreover point out that, inasmuch as these 52 individual cases are at various stages of criminal proceedings before the United States courts, they are in the state of *pendente lite*; and the Court has already indicated in respect of them what it regards as the appropriate remedy, namely review and reconsideration by reference to the breach of the Vienna Convention.

149. The Mexican request for guarantees of non-repetition is based on its contention that beyond these 52 cases there is a "regular and continuing" pattern of breaches by the United States of Article 36. In this respect, the Court observes that there is no evidence properly before it that would establish a general pattern. While it is a matter of concern that, even in the wake of the *LaGrand* Judgment, there remain a substantial number of cases of failure to carry out the obligation to furnish consular information to Mexican nationals, the Court notes that the United States has been making considerable efforts to ensure that its law enforcement authorities provide consular information to every arrested person they know or have reason to believe is a foreign national. Especially at the stage of pre-trial consular information, it is noteworthy that the United States has been making good faith efforts to implement the obligations incumbent upon it under Article 36, paragraph 1, of the Vienna Convention, through such measures as a new outreach programme launched in 1998, including the dissemination to federal, state and local authorities of the State Department booklet mentioned above in para-

graph 63. The Court wishes to recall in this context what it has said in paragraph 64 about efforts in some jurisdictions to provide the information under Article 36, paragraph 1 *(b)*, in parallel with the reading of the "Miranda rights".

150. The Court would further note in this regard that in the *LaGrand* case Germany sought, *inter alia*, "a straightforward assurance that the United States will not repeat its unlawful acts" (*I.C.J. Reports 2001*, p. 511, para. 120). With regard to this general demand for an assurance of non-repetition, the Court stated:

> "If a State, in proceedings before this Court, repeatedly refers to substantial activities which it is carrying out in order to achieve compliance with certain obligations under a treaty, then this expresses a commitment to follow through with the efforts in this regard. The programme in question certainly cannot provide an assurance that there will never again be a failure by the United States to observe the obligations of notification under Article 36 of the Vienna Convention. But no State could give such a guarantee and Germany does not seek it. The Court considers that the commitment expressed by the United States to ensure implementation of the specific measures adopted in performance of its obligations under Article 36, paragraph 1 *(b)*, must be regarded as meeting Germany's request for a general assurance of non-repetition." (*I.C.J. Reports 2001*, pp. 512-513, para. 124.)

The Court believes that as far as the request of Mexico for guarantees and assurances of non-repetition is concerned, what the Court stated in this passage of the *LaGrand* Judgment remains applicable, and therefore meets that request.

* * *

151. The Court would now re-emphasize a point of importance. In the present case, it has had occasion to examine the obligations of the United States under Article 36 of the Vienna Convention in relation to Mexican nationals sentenced to death in the United States. Its findings as to the duty of review and reconsideration of convictions and sentences have been directed to the circumstance of severe penalties being imposed on foreign nationals who happen to be of Mexican nationality. To avoid any ambiguity, it should be made clear that, while what the Court has stated concerns the Mexican nationals whose cases have been brought before it by Mexico, the Court has been addressing the issues of principle raised in

the course of the present proceedings from the viewpoint of the general application of the Vienna Convention, and there can be no question of making an *a contrario* argument in respect of any of the Court's findings in the present Judgment. In other words, the fact that in this case the Court's ruling has concerned only Mexican nationals cannot be taken to imply that the conclusions reached by it in the present Judgment do not apply to other foreign nationals finding themselves in similar situations in the United States.

* *

152. By its Order of 5 February 2003 the Court, acting on a request by Mexico, indicated by way of provisional measure that

> "The United States of America shall take all measures necessary to ensure that Mr. César Roberto Fierro Reyna, Mr. Roberto Moreno Ramos and Mr. Osvaldo Torres Aguilera are not executed pending final judgment in these proceedings" (*I.C.J. Reports 2003*, pp. 91-92, para. 59 (I)) (see paragraph 21 above).

The Order of 5 February 2003, according to its terms and to Article 41 of the Statute, was effective pending final judgment, and the obligations of the United States in that respect are, with effect from the date of the present Judgment, replaced by those declared in this Judgment. The Court has rejected Mexico's submission that, by way of *restitutio in integrum*, the United States is obliged to annul the convictions and sentences of all of the Mexican nationals the subject of its claims (see above, paragraphs 115-125). The Court has found that, in relation to these three persons (among others), the United States has committed breaches of its obligations under Article 36, paragraph 1 *(b)*, of the Vienna Convention and Article 36, paragraphs 1 *(a)* and *(c)*, of that Convention; moreover, in respect of those three persons alone, the United States has also committed breaches of Article 36, paragraph 2, of the said Convention. The review and reconsideration of conviction and sentence required by Article 36, paragraph 2, which is the appropriate remedy for breaches of Article 36, paragraph 1, has not been carried out. The Court considers that in these three cases it is for the United States to find an appropriate remedy having the nature of review and reconsideration according to the criteria indicated in paragraphs 138 *et seq.* of the present Judgment.

* * *

153. For these reasons,

THE COURT,

(1) By thirteen votes to two,

Rejects the objection by the United Mexican States to the admissibility of the objections presented by the United States of America to the jurisdiction of the Court and the admissibility of the Mexican claims;

IN FAVOUR: *President* Shi; *Vice-President* Ranjeva; *Judges* Guillaume, Koroma, Vereshchetin, Higgins, Kooijmans, Rezek, Al-Khasawneh, Buergenthal, Elaraby, Owada, Tomka;

AGAINST: *Judge* Parra-Aranguren; *Judge* ad hoc Sepúlveda;

(2) Unanimously,

Rejects the four objections by the United States of America to the jurisdiction of the Court;

(3) Unanimously,

Rejects the five objections by the United States of America to the admissibility of the claims of the United Mexican States;

(4) By fourteen votes to one,

Finds that, by not informing, without delay upon their detention, the 51 Mexican nationals referred to in paragraph 106 (1) above of their rights under Article 36, paragraph 1 *(b)*, of the Vienna Convention on Consular Relations of 24 April 1963, the United States of America breached the obligations incumbent upon it under that subparagraph;

IN FAVOUR: *President* Shi; *Vice-President* Ranjeva; *Judges* Guillaume, Koroma, Vereshchetin, Higgins, Kooijmans, Rezek, Al-Khasawneh, Buergenthal, Elaraby, Owada, Tomka; *Judge* ad hoc Sepúlveda;

AGAINST: *Judge* Parra-Aranguren;

(5) By fourteen votes to one,

Finds that, by not notifying the appropriate Mexican consular post without delay of the detention of the 49 Mexican nationals referred to in paragraph 106 (2) above and thereby depriving the United Mexican States of the right, in a timely fashion, to render the assistance provided for by the Vienna Convention to the individuals concerned, the United States of America breached the obligations incumbent upon it under Article 36, paragraph 1 *(b)*;

IN FAVOUR: *President* Shi; *Vice-President* Ranjeva; *Judges* Guillaume, Koroma, Vereshchetin, Higgins, Kooijmans, Rezek, Al-Khasawneh, Buergenthal, Elaraby, Owada, Tomka; *Judge* ad hoc Sepúlveda;

AGAINST: *Judge* Parra-Aranguren;

(6) By fourteen votes to one,

Finds that, in relation to the 49 Mexican nationals referred to in paragraph 106 (3) above, the United States of America deprived the United Mexican States of the right, in a timely fashion, to communicate with and have access to those nationals and to visit them in detention, and thereby

breached the obligations incumbent upon it under Article 36, paragraph 1 *(a)* and *(c)*, of the Convention;

IN FAVOUR: *President* Shi; *Vice-President* Ranjeva; *Judges* Guillaume, Koroma, Vereshchetin, Higgins, Kooijmans, Rezek, Al-Khasawneh, Buergenthal, Elaraby, Owada, Tomka; *Judge* ad hoc Sepúlveda;

AGAINST: *Judge* Parra-Aranguren;

(7) By fourteen votes to one,

Finds that, in relation to the 34 Mexican nationals referred to in paragraph 106 (4) above, the United States of America deprived the United Mexican States of the right, in a timely fashion, to arrange for legal representation of those nationals, and thereby breached the obligations incumbent upon it under Article 36, paragraph 1 *(c)*, of the Convention;

IN FAVOUR: *President* Shi; *Vice-President* Ranjeva; *Judges* Guillaume, Koroma, Vereshchetin, Higgins, Kooijmans, Rezek, Al-Khasawneh, Buergenthal, Elaraby, Owada, Tomka; *Judge* ad hoc Sepúlveda;

AGAINST: *Judge* Parra-Aranguren;

(8) By fourteen votes to one,

Finds that, by not permitting the review and reconsideration, in the light of the rights set forth in the Convention, of the conviction and sentences of Mr. César Roberto Fierro Reyna, Mr. Roberto Moreno Ramos and Mr. Osvaldo Torres Aguilera, after the violations referred to in subparagraph (4) above had been established in respect of those individuals, the United States of America breached the obligations incumbent upon it under Article 36, paragraph 2, of the Convention;

IN FAVOUR: *President* Shi; *Vice-President* Ranjeva; *Judges* Guillaume, Koroma, Vereshchetin, Higgins, Kooijmans, Rezek, Al-Khasawneh, Buergenthal, Elaraby, Owada, Tomka; *Judge* ad hoc Sepúlveda;

AGAINST: *Judge* Parra-Aranguren;

(9) By fourteen votes to one,

Finds that the appropriate reparation in this case consists in the obligation of the United States of America to provide, by means of its own choosing, review and reconsideration of the convictions and sentences of the Mexican nationals referred to in subparagraphs (4), (5), (6) and (7) above, by taking account both of the violation of the rights set forth in Article 36 of the Convention and of paragraphs 138 to 141 of this Judgment;

IN FAVOUR: *President* Shi; *Vice-President* Ranjeva; *Judges* Guillaume, Koroma, Vereshchetin, Higgins, Kooijmans, Rezek, Al-Khasawneh, Buergenthal, Elaraby, Owada, Tomka; *Judge* ad hoc Sepúlveda;

AGAINST: *Judge* Parra-Aranguren;

(10) Unanimously,

Takes note of the commitment undertaken by the United States of America to ensure implementation of the specific measures adopted in performance of its obligations under Article 36, paragraph 1 *(b)*, of the Vienna Convention; and *finds* that this commitment must be regarded as meeting the request by the United Mexican States for guarantees and assurances of non-repetition;

(11) Unanimously,

Finds that, should Mexican nationals nonetheless be sentenced to severe penalties, without their rights under Article 36, paragraph 1 *(b)*, of the Convention having been respected, the United States of America shall provide, by means of its own choosing, review and reconsideration of the conviction and sentence, so as to allow full weight to be given to the violation of the rights set forth in the Convention, taking account of paragraphs 138 to 141 of this Judgment.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this thirty-first day of March, two thousand and four, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the United Mexican States and the Government of the United States of America, respectively.

(Signed) SHI Jiuyong,
President.

(Signed) Philippe COUVREUR,
Registrar.

President SHI and Vice-President RANJEVA append declarations to the Judgment of the Court; Judges VERESHCHETIN, PARRA-ARANGUREN and TOMKA and Judge *ad hoc* SEPÚLVEDA append separate opinions to the Judgment of the Court.

(Initialled) J.Y.S.
(Initialled) Ph.C.

PUBLICATIONS DE LA COUR PERMANENTE DE JUSTICE INTERNATIONALE

SÉRIE A — N° 17

Le 13 septembre 1928

RECUEIL DES ARRÊTS

N° 13

AFFAIRE RELATIVE A L'USINE DE CHORZÓW

(DEMANDE EN INDEMNITÉ)

(FOND)

PUBLICATIONS OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE

SERIES A.—No. 17

September 13th, 1928

COLLECTION OF JUDGMENTS

No. 13

CASE CONCERNING THE FACTORY AT CHORZÓW

(CLAIM FOR INDEMNITY)

(MERITS)

LEYDE
SOCIÉTÉ D'ÉDITIONS
A. W. SIJTHOFF
1928



LEYDEN
A. W. SIJTHOFF'S
PUBLISHING COMPANY
1928

annulment of the sale of the factory. Furthermore, the Court has stated that this article does not involve a prohibition of alienation, and that the rights reserved to the Allied and Associated Powers in the article are exercised through the Reparation Commission. But it would be difficult to understand how these rights could be affected by the payment to the Reich, as an indemnity, of the value of the factory, seeing that, without such a payment, the rights of the Reich in the enterprise would probably lose all value. The objection based on this article must therefore also be overruled.

The Court considers that it should confine itself to rejecting the submission whereby the Polish Government asks for a suspension, since by so doing and by overruling the objections raised by the Polish Government on the basis of Article 256 of the Treaty of Versailles, it is deciding in conformity with the German submission to the extent that that submission is well-founded; the Court cannot, in fact, consider the submission in question in so far as it relates to third parties who are not specified.

III.

The existence of a damage to be made good being recognized by the respondent Party as regards the Bayerische, and the objections raised by the same Party against the existence of any damage that would justify compensation to the Oberschlesische being set aside, the Court must now lay down the guiding principles according to which the amount of compensation due may be determined.

The action of Poland which the Court has judged to be contrary to the Geneva Convention is not an expropriation—to render which lawful only the payment of fair compensation would have been wanting; it is a seizure of property, rights and interests which could not be expropriated even against compensation, save under the exceptional conditions fixed by Article 7 of the said Convention. As the Court has expressly declared in Judgment No. 8, reparation is in this case the consequence not of the application of Articles 6 to 22 of the Geneva Convention, but of acts contrary to those articles.

It follows that the compensation due to the German Government is not necessarily limited to the value of the undertaking at the moment of dispossession, plus interest to the day of payment. This limitation would only be admissible if the Polish Government had had the right to expropriate, and if its wrongful act consisted merely in not having paid to the two Companies the just price of what was expropriated; in the present case, such a limitation might result in placing Germany and the interests protected by the Geneva Convention, on behalf of which interests the German Government is acting, in a situation more unfavourable than that in which Germany and these interests would have been if Poland had respected the said Convention. Such a consequence would not only be unjust, but also and above all incompatible with the aim of Article 6 and following articles of the Convention—that is to say, the prohibition, in principle, of the liquidation of the property, rights and interests of German nationals and of companies controlled by German nationals in Upper Silesia—since it would be tantamount to rendering lawful liquidation and unlawful dispossession indistinguishable in so far as their financial results are concerned.

The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.

This conclusion particularly applies as regards the Geneva Convention, the object of which is to provide for the maintenance of economic life in Upper Silesia on the basis of respect for the *status quo*. The dispossession of an industrial undertaking—the expropriation of which is prohibited by the

Geneva Convention—then involves the obligation to restore the undertaking and, if this be not possible, to pay its value at the time of the indemnification, which value is designed to take the place of restitution which has become impossible. To this obligation, in virtue of the general principles of international law, must be added that of compensating loss sustained as the result of the seizure. The impossibility, on which the Parties are agreed, of restoring the Chorzów factory could therefore have no other effect but that of substituting payment of the value of the undertaking for restitution; it would not be in conformity either with the principles of law or with the wish of the Parties to infer from that agreement that the question of compensation must henceforth be dealt with as though an expropriation properly so called was involved.

* * *

Such being the principles to be followed in fixing the compensation due, the Court may now consider whether the damage to be made good is to be estimated separately for each of the two Companies, as the Applicant has claimed, or whether it is preferable to fix a lump sum.

If the Court were dealing with damage which, though caused by a single act, had affected persons independent the one of the other, the natural method to be applied would be a separate assessment of the damage sustained by each of them; the total amount of compensation thus assessed would then constitute the amount of reparation due to the State.

In the present case, the situation is different. The economic unity of the Chorzów undertaking, pointed out by the Court in its Judgment No. 6, is shown above all in the fact that the interests possessed by the two Companies in the said undertaking are interdependent and complementary; it follows that they cannot simply be added together without running the risk of the same damage being compensated twice over; for all that the Bayerische would have obtained from its participation in the undertaking (sums due and shares in the profits) would have been payable by the Oberschlesische. The value

INTERNATIONAL COURT OF JUSTICE

APPLICATION OF THE REPUBLIC OF PARAGUAY

On behalf of the Republic of Paraguay and in accordance with Article 40, paragraph 1, of the Statute of the Court and Article 38 of the Rules of the Court, I respectfully submit this Application instituting proceedings in the name of the Government of the Republic of Paraguay against the Government of the United States of America for violations of the Vienna Convention on Consular Relations (done on 24 April 1963) (the "Vienna Convention"). The Court has jurisdiction pursuant to Article I of the Vienna Convention's Optional Protocol concerning the Compulsory Settlement of Disputes.

Preliminary Statement

1. Article 36, subparagraph 1 *(b)*, of the Vienna Convention requires the competent authorities of a State party to advise, "without delay," a national of another State party whom such authorities arrest or detain of the national's right to consular assistance guaranteed by Article 36.

"[I]f he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner." *(Ibid.)*

2. As the Government of the United States stated in its Memorial in the case concerning *United States Diplomatic and Consular Staff in Tehran*:

"a principal function of the consular officer is to provide varying kinds of assistance to nationals of the sending State, and for this reason the channel of communication between consular officers and nationals must at all times remain open. Indeed, such communication is so essential to the exercise of consular functions that its preclusion would render meaningless the entire establishment of consular relations. *[. . .]* Article 36 establishes rights not only for the consular officer but, perhaps even more importantly, for the nationals of the sending State who are assured access to consular officers and through them to others." (*I.C.J. Pleadings*, p. 174 [references omitted].)

3. In 1992, the authorities of the Commonwealth of Virginia, one of the federated states comprising the United States, detained a Paraguayan citizen named Angel Francisco Breard. Without advising Mr. Breard of his right to consular assistance, or notifying Paraguayan consular officers of his detention, as required by the Vienna Convention, such authorities tried and convicted Mr. Breard and sentenced him to death.

4. These actions violated the obligations owed by the United States to Paraguay under the Vienna Convention. As a result of the breach, Paraguay is entitled to *restitutio in integrum*:

the re-establishment of the situation that existed before the United States failed to provide the notifications and permit the consular assistance required by the Convention.

I. The Facts

Municipal Court Proceedings concerning Mr. Breard

5. On 1 September 1992, law enforcement authorities of Virginia arrested Mr. Breard on suspicion of murder. Although aware of Mr. Breard's Paraguayan nationality, the authorities at no time informed Mr. Breard of his rights to consular assistance under Article 36, subparagraph 1 *(b)*, of the Vienna Convention. Nor did the authorities ever advise Paraguayan consular officers of Mr. Breard's detention. Unaware of, and not having been apprised of, these rights, Mr. Breard could not and did not exercise them before his trial.

6. Had Mr. Breard been properly informed of his rights under the Vienna Convention, he would have communicated with his Consul, seeking the assistance provided for in Article 36. In turn, Paraguay would have rendered that assistance.

7. The failure to provide the notification required by the Vienna Convention thus precluded Paraguay from protecting its interests in the United States as provided for in Articles 5 and 36 of the Vienna Convention. Among other things, Paraguay could not contact its national, assist in the defence of its national (as described in paragraphs 8 and 10 below), monitor the conditions of its national's detention, or ensure that international legal norms were respected in the treatment of, and proceedings against, its national.

8. The failure to provide the required notification also precluded Paraguay from protecting its national's interests in the United States as provided for in Articles 5 and 36 of the Vienna Convention. The authorities of Virginia effectively prevented Paraguayan consular officers from arranging for appropriate legal representation of Mr. Breard. Instead, the authorities themselves arranged for Mr. Breard to be represented by court-appointed counsel who were unfamiliar with Paraguayan culture and with the preconceptions concerning the criminal justice system that a Paraguayan national might be expected to have.

9. As a result of the lack of consular assistance, Mr. Breard made a number of objectively unreasonable decisions during the criminal proceedings against him, which were conducted without translation. He refused to accept the authorities' offer of life in prison in exchange for his pleading guilty to the crime. Instead, Mr. Breard insisted on risking a death sentence and confessing and denouncing his past criminal conduct at trial. Mr. Breard took these highly detrimental steps because — in the absence of advice from his consulate — he did not comprehend the fundamental differences between the criminal justice systems of the United States and Paraguay. Whereas Mr. Breard believed his confession and denunciation would appeal to the mercy of the American court, as he understood they would a court in Paraguay, in reality these acts virtually assured Mr. Breard's conviction and death sentence.

10. Consular assistance would have included advice on cultural and legal differences between Paraguay and the United States, including the desirability of accepting or rejecting plea offers in light of those differences; an interpreter; appropriate additional or other legal counsel; identifying and communicating with family members who could provide assistance and

information; supplying records, documents, and other evidence helpful to Mr. Breard's defence; transport of family members and other witnesses to Virginia to provide testimony; attendance by consular officers at court or other proceedings; collecting and presenting mitigating evidence at the sentencing phase; and other forms of assistance both legal and non-legal. Such consular assistance would have affected the result of the criminal proceeding against Mr. Breard, including any sentence imposed.

11. On 24 June 1993, Mr. Breard was convicted of murder. On 22 August 1993, the trial court imposed a death sentence. Mr. Breard's direct appeals of the conviction and sentence were denied, as was his petition to the state courts for a writ of *habeas corpus*, a collateral proceeding seeking relief from unlawful detention.

12. In the spring of 1996, Paraguay, without benefit of information from the authorities of Virginia and the United States, finally learned that Mr. Breard was imprisoned in the United States and awaiting execution. Immediately upon learning of his situation, Paraguay, through its embassy and consulate, began rendering assistance, both legal and otherwise, to Mr. Breard. Until contacted by the Paraguayan consular representatives at that time, Mr. Breard had been entirely unaware of his rights under the Vienna Convention.

13. On 30 August 1996, with the assistance of Paraguayan consular officers, Mr. Breard took the final step available to him for challenging his conviction and sentence by filing a petition to the federal court of first instance for a writ of *habeas corpus*. For the first time, Mr. Breard claimed violations of the Vienna Convention. That court rejected the assertion of this and other claims based on a municipal law doctrine of "procedural default" (*Breard* v. *Netherland*, 949 F. Supp. 1255 (E.D. Va. 1996)). Applying this doctrine, the court decided that, because Mr. Breard had not asserted his rights under the Vienna Convention in his previous legal proceedings, he could not assert them in the federal *habeas* proceeding. This municipal law doctrine was held to bar such relief even though, first, Mr. Breard was unaware of his rights under the Convention at the time of the earlier legal proceedings, and second, he was unaware of his rights precisely because the local authorities failed to comply with their obligations under the Convention promptly to inform him of those rights. The intermediate federal appellate court affirmed. (*Breard* v. *Pruett*, 134 F. 3d 615 (4th Cir. 1998).) Mr. Breard's appeal to the intermediate federal appellate court was the last means of legal recourse in the United States available to him as of right.

14. In light of the federal appellate court's affirmance of the federal trial court's denial of Mr. Breard's *habeas* petition, the Virginia court that sentenced Mr. Breard has set an execution date of 14 April 1998. Absent intervention, officials of Virginia will then, in the words of the authorizing statute,"cause the prisoner under sentence of death to be electrocuted or injected with a lethal substance until he is dead" (*Va. Stat. Ann.* õ 53.1-234).

15. By petition for a writ of *certiorari*, Mr. Breard has now requested that the United States Supreme Court exercise its discretionary authority to review the lower federal courts' decision against him and grant a stay of his execution pending that review. The Supreme Court grants less than 5 per cent of all *certiorari* petitions submitted to it. Moreover, in cases, such as Mr. Breard's, involving an imminent execution and submitted on an expedited basis, the Court frequently does not rule on the petition and accompanying request for interim relief until days, or even hours, before the scheduled execution.

Paraguay's Efforts To Secure Relief In The United States

16. On 16 September 1996, the Republic of Paraguay filed its own civil lawsuit in a federal court of first instance against the municipal officials responsible for Mr. Breard's arrest, conviction, continuing imprisonment, and pending execution, alleging violations of the Vienna Convention. Paraguay sought, among other relief, an order vacating Mr. Breard's conviction, barring the municipal officials from taking any future actions based on that conviction, including refraining from putting Mr. Breard to death, and requiring those officials to afford Paraguay its rights under the Convention in any future proceedings should Virginia, as Paraguay would expect, seek to prosecute Mr. Breard anew.

17. Paraguay did not seek from the federal court of first instance, and does not intend to seek from this Court, any relief barring the competent authorities of the United States from enforcing its criminal law or, specifically, retrying Mr. Breard if the competent authorities are so advised. Paraguay does contend, however, that the competent authorities of the United States must enforce the criminal law by means that comport with the obligations undertaken by the United States in the Vienna Convention.

18. On 27 November 1996, without having considered the merits of Paraguay's claim, the federal court of first instance held that it could not take jurisdiction of the case because it was barred by a municipal doctrine providing sovereign immunity to the several states that comprise the United States (*Paraguay* v. *Allen*, 949 F. Supp. 1269 (E.D. Va. 1996)). Paraguay appealed the decision, which was affirmed (*Paraguay* v. *Allen*, 134 F. 3d 622 (4th Cir. 1998)). During the appellate proceedings, the United States took the position that although the Vienna Convention is of great importance to United States nationals abroad, the issue of its own violation of the Convention was not justiciable in the courts of the United States in an action brought by another State party to the Convention.

19. Paraguay has filed a petition for a writ of *certiorari* in the United States Supreme Court seeking review of the appellate decision. As explained above, a petition for *certiorari* is a matter of the Supreme Court's discretion and is rarely granted.

20. In addition to its efforts to have its claim heard in the courts of the United States, Paraguay has also engaged in diplomatic efforts to gain the assistance of the United States in remedying the effect of the breach of the Vienna Convention. In a letter dated 10 December 1996, the Ambassador of Paraguay sought the good offices of the United States Department of State,

"in order that a new trial may be granted Paraguayan citizen Angel Breard within the framework of constitutional guarantees for proper defence against a criminal accusation as well as the strict fulfillment of the stipulations of international treaties covering acts of such nature".

In a response delivered 3 June 1997, the Department of State expressed disagreement with Paraguay's legal position and offered no assistance to Paraguay in exercising its rights under the Treaties.

II. The Jurisdiction of the Court

21. Under Article 36, paragraph 1, of the Statute of the Court, "[t]he jurisdiction of the Court comprises . . . all matters specially provided for . . . in treaties and conventions in force".

22. The Republic of Paraguay and the United States are, as Members of the United Nations, parties to the Statute, and are parties to the Vienna Convention and to its Optional Protocol concerning the Compulsory Settlement of Disputes. Article I of the Optional Protocol provides:

"Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol."

23. Paraguay therefore submits that, upon the filing of the present Application, the matters in dispute between Paraguay and the United States concerning Paraguay's claims under the Vienna Convention lie within the compulsory jurisdiction of the Court.

III. The Claims of the Republic of Paraguay

24. The Government of the Republic of Paraguay claims that:

(a) Pursuant to Article 36, subparagraph 1 *(b)*, of the Vienna Convention, the United States is under the international legal obligation to Paraguay, a State party to the Convention, to inform "without delay" any Paraguayan national, such as Mr. Breard, who is "arrested or committed to prison or to custody pending trial or is detained in any other manner" of his rights under that subparagraph. These rights include:

(i) the right, if the national arrested or detained so requests, to have the competent authorities of the receiving State inform the local consular post of the sending State that that State's national has been so arrested or committed to prison or to custody pending trial or detained in any other manner;

(ii) the right to have the competent authorities of the receiving State forward any communication "addressed to the consular post from the person arrested, in prison, custody or detention . . . without delay".

The United States has violated and is currently violating the foregoing obligations.

(b) Pursuant to Article 36, subparagraph 1 *(b)*, of the Vienna Convention, the United States is under the international legal obligation to an arrested national of Paraguay, such as Mr. Breard, to inform him "without delay" of his rights under that subparagraph. These rights include:

(i) the right, if the national arrested or detained so requests, to have the competent authorities of the receiving State inform the local consular post of the sending State that that State's national has been so arrested or committed to prison or to custody pending trial or detained in any other manner;

(ii) the right to have the competent authorities of the receiving State forward any communication "addressed to the consular post from the person arrested, in prison, custody or detention . . . without delay".

The United States has violated and is currently violating the foregoing obligations with respect to Mr. Breard.

(c) Pursuant to Article 36 of the Vienna Convention, the United States is under the international legal obligation to ensure that Paraguay can communicate with and assist an arrested national prior to trial. Its failure to provide the notifications required by Article 36, subparagraph 1 *(b)*, of the Vienna Convention has effectively prevented Paraguay from exercising its right to carry out consular functions pursuant to articles 5 and 36 of the Convention. The United States therefore has violated and is currently violating the foregoing obligation.

(d) Pursuant to Article 36, paragraph 2, of the Vienna Convention and Article 26 of the Vienna Convention on the Law of Treaties (done on 23 May 1969), the United States is under an international legal obligation to ensure that its municipal law and regulations enable full effect to be given to the purposes of the rights accorded under Article 36. The United States has violated and is currently violating the foregoing obligation.

(e) Pursuant to Article 27 of the Vienna Convention on the Law of Treaties and to customary international law, the United States may not derogate from its international legal obligation to uphold the Vienna Convention based upon its municipal law doctrines and rules, nor upon the basis that the acts in derogation are those of a subordinate organ or constituent or judicial power. The United States has violated and is currently violating the foregoing obligation.

IV. The Judgment Requested

25. Accordingly, the Republic of Paraguay asks the Court to adjudge and declare:

(1) that the United States, in arresting, detaining, trying, convicting, and sentencing Angel Francisco Breard, as described in the preceding statement of facts, violated its international legal obligations to Paraguay, in its own right and in the exercise of its right of diplomatic protection of its national, as provided by Articles 5 and 36 of the Vienna Convention;

(2) that Paraguay is therefore entitled to *restitutio in integrum*;

(3) that the United States is under an international legal obligation not to apply the doctrine of "procedural default" or any other doctrine of its internal law, so as to preclude the exercise of the rights accorded under Article 36 of the Vienna Convention; and

(4) that the United States is under an international legal obligation to carry out in conformity with the foregoing international legal obligations any future detention of or criminal proceedings against Angel Francisco Breard or any other Paraguayan national in its territory, whether by a constituent, legislative, executive, judicial or other power, whether that power holds a superior or a subordinate position in the organization of the United States, and whether that power's functions are of an international or internal character;

and that, pursuant to the foregoing international legal obligations,

(1) any criminal liability imposed on Angel Francisco Breard in violation of international legal obligations is void, and should be recognized as void by the legal authorities of the United States;

(2) the United States should restore the *status quo ante*, that is, re-establish the situation that existed before the detention of, proceedings against, and conviction and sentencing of Paraguay's national in violation of the United States' international legal obligations took place; and

(3) the United States should provide Paraguay a guarantee of the non-repetition of the illegal acts.

V. Judge *Ad Hoc*

26. In accordance with the provisions of Article 31 of the Statute and Article 35, paragraph 1, of the Rules, the Republic of Paraguay declares its intention to exercise its right to name a judge *ad hoc*.

VI. Reservation of Rights

27. The Republic of Paraguay reserves the right to modify and extend the terms of this Application, as well as the grounds invoked.

VII. Provisional Measures

28. The Republic of Paraguay requests that the Court indicate interim measures of protection, as set forth in a separate request filed concurrently with this Application.

* *

I have the honour to reassure the Court of my highest esteem and consideration.

Brussels, 3 April 1998

(*Signed)* Manuel María Cáceres

Ambassador of the Republic of Paraguay to the Kingdom of Belgium and the Kingdom of the Netherlands

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INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

CASE CONCERNING THE VIENNA CONVENTION ON CONSULAR RELATIONS

(PARAGUAY *v.* UNITED STATES OF AMERICA)

REQUEST FOR THE INDICATION OF PROVISIONAL MEASURES

ORDER OF 9 APRIL 1998

1998

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRE RELATIVE À LA CONVENTION DE VIENNE SUR LES RELATIONS CONSULAIRES

(PARAGUAY c. ÉTATS-UNIS D'AMÉRIQUE)

DEMANDE EN INDICATION DE MESURES CONSERVATOIRES

ORDONNANCE DU 9 AVRIL 1998

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CASE CONCERNING THE VIENNA CONVENTION ON CONSULAR RELATIONS

(PARAGUAY *v.* UNITED STATES OF AMERICA)

REQUEST FOR THE INDICATION OF PROVISIONAL MEASURES

ORDER

Present: *Vice-President* WEERAMANTRY, *Acting President*; *President* SCHWEBEL; *Judges* ODA, BEDJAOUI, GUILLAUME, RANJEVA, HERCZEGH, SHI, FLEISCHHAUER, KOROMA, VERESHCHETIN, HIGGINS, PARRA-ARANGUREN, KOOIJMANS, REZEK; *Registrar* VALENCIA-OSPINA.

The International Court of Justice,

Composed as above,

After deliberation,

Having regard to Articles 41 and 48 of the Statute of the Court and to Articles 73, 74 and 75 of the Rules of Court,

Having regard to the Application filed in the Registry of the Court on 3 April 1998, whereby the Republic of Paraguay (hereinafter "Paraguay") instituted proceedings against the United States of America (hereinafter "the United States") for "violations of the Vienna Convention on Consular Relations [of 24 April 1963]" (hereinafter the "Vienna Convention") allegedly committed by the United States,

Makes the following Order:

1. Whereas, in its aforementioned Application, Paraguay bases the jurisdiction of the Court on Article 36, paragraph 1, of the Statute of the Court and on Article I of the Optional Protocol concerning the Compulsory Settlement of Disputes, which accompanies the Vienna Convention on Consular Relations ("the Optional Protocol");

2. Whereas, in the Application, it is stated that in 1992 the authorities of the Commonwealth of Virginia arrested a Paraguayan national, Mr. Angel Francisco Breard; whereas it is maintained that he was charged, tried, convicted of culpable homicide and sentenced to death by a Virginia court (the Circuit Court of Arlington County) in 1993, without having been informed, as is required under Article 36, subparagraph 1 *(b)*, of the Vienna Convention, of his rights under that provision; whereas it is specified that among these rights are the right to request that the relevant consular office of the State of which he is national be advised of his arrest and detention, and the right to communicate with that office; and whereas it is also alleged that the authorities of the Commonwealth of Virginia also did not advise the Paraguayan consular officers of Mr. Breard's detention, and that those officers were only able to render assistance to him from 1996, when the Paraguayan Government learnt by its own means that Mr. Breard was imprisoned in the United States;

3. Whereas, in the Application, Paraguay states that Mr. Breard's subsequent petitions before federal courts in order to seek a writ of *habeas corpus* failed, the federal court of first instance having, on the basis of the doctrine of "procedural default", denied him the right to invoke the Vienna Convention for the first time before that court, and the intermediate federal appellate court having confirmed that decision; whereas, consequently, the Virginia court that sentenced Mr. Breard to the death penalty set an execution date of 14 April 1998; whereas Mr. Breard, having exhausted all means of legal recourse available to him as of right, petitioned the United States Supreme Court for a writ of *certiorari*, requesting it to exercise its discretionary power to review the decision given by the lower federal courts and to grant a stay of his execution pending that review, and whereas, while this request is still pending before the Supreme Court, it is however rare for that Court to accede to such requests; and whereas Paraguay stated, moreover, that it brought proceedings itself before the federal courts of the United States as early as 1996, with a view to obtaining the annulment of the proceedings initiated against Mr. Breard, but both the federal court of first instance and the federal appellate court held that they had no jurisdiction in the case because it was barred by a doctrine conferring "sovereign immunity" on federated states; whereas Paraguay also filed a petition for a writ of *certiorari* in the Supreme Court, which is also still pending; and whereas Paraguay furthermore engaged in diplomatic efforts with the Govern-

ment of the United States and sought the good offices of the Department of State;

4. Whereas, in its Application, Paraguay maintains that by violating its obligations under Article 36, subparagraph 1 *(b)*, of the Vienna Convention, the United States prevented Paraguay from exercising the consular functions provided for in Articles 5 and 36 of the Convention and specifically for ensuring the protection of its interests and of those of its nationals in the United States; whereas Paraguay states that it was not able to contact Mr. Breard nor to offer him the necessary assistance, and whereas accordingly Mr. Breard "made a number of objectively unreasonable decisions during the criminal proceedings against him, which were conducted without translation"; and "did not comprehend the fundamental differences between the criminal justice systems of the United States and Paraguay"; and whereas Paraguay concludes from this that it is entitled to *restitutio in integrum*, that is to say "the re-establishment of the situation that existed before the United States failed to provide the notifications . . . required by the Convention";

5. Whereas Paraguay requests the Court to adjudge and declare as follows:

"(1) that the United States, in arresting, detaining, trying, convicting, and sentencing Angel Francisco Breard, as described in the preceding statement of facts, violated its international legal obligations to Paraguay, in its own right and in the exercise of its right of diplomatic protection of its national, as provided by Articles 5 and 36 of the Vienna Convention;

(2) that Paraguay is therefore entitled to *restitutio in integrum;*

(3) that the United States is under an international legal obligation not to apply the doctrine of 'procedural default', or any other doctrine of its internal law, so as to preclude the exercise of the rights accorded under Article 36 of the Vienna Convention; and

(4) that the United States is under an international legal obligation to carry out in conformity with the foregoing international legal obligations any future detention of or criminal proceedings against Angel Francisco Breard or any other Paraguayan national in its territory, whether by a constituent, legislative, executive, judicial or other power, whether that power holds a superior or a subordinate position in the organization of the United States, and whether that power's functions are of an international or internal character;

and that, pursuant to the foregoing international legal obligations,

(1) any criminal liability imposed on Angel Francisco Breard in violation of international legal obligations is void, and should

be recognized as void by the legal authorities of the United States;

(2) the United States should restore the *status quo ante*, that is, re-establish the situation that existed before the detention of, proceedings against, and conviction and sentencing of Paraguay's national in violation of the United States' international legal obligations took place; and

(3) the United States should provide Paraguay a guarantee of the non-repetition of the illegal acts";

6. Whereas, on 3 April 1998, after having filed its Application, Paraguay also submitted an urgent request for the indication of provisional measures in order to protect its rights, pursuant to Article 41 of the Statute of the Court and to Articles 73, 74 and 75 of the Rules of Court;

7. Whereas, in its request for the indication of provisional measures, Paraguay refers to the basis of jurisdiction of the Court invoked in its Application, and to the facts set out and the submissions made therein; and whereas it reaffirms in particular that the United States has violated its obligations under the Vienna Convention and must restore the *status quo ante;*

8. Whereas, in its request for the indication of provisional measures of protection, Paraguay states that, on 25 February 1998, the Circuit Court of Arlington County, Virginia, ordered that Mr. Breard be executed on 14 April 1998; whereas it emphasizes that "[t]he importance and sanctity of an individual human life are well established in international law" and "[a]s recognized by Article 6 of the International Covenant on Civil and Political Rights, every human being has the inherent right to life and this right shall be protected by law"; and whereas Paraguay states in the following terms the grounds for its request and the possible consequences of its dismissal:

> "Under the grave and exceptional circumstances of this case, and given the paramount interest of Paraguay in the life and liberty of its nationals, provisional measures are urgently needed to protect the life of Paraguay's national and the ability of this Court to order the relief to which Paraguay is entitled: restitution in kind. Without the provisional measures requested, the United States will execute Mr. Breard before this Court can consider the merits of Paraguay's claims, and Paraguay will be forever deprived of the opportunity to have the *status quo ante* restored in the event of a judgment in its favour";

9. Whereas Paraguay asks that, pending final judgment in this case, the Court indicate:

"*(a)* that the Government of the United States take the measures necessary to ensure that Mr. Breard not be executed pending the disposition of this case;

(b) that the Government of the United States report to the Court

the actions it has taken in pursuance of subparagraph *(a)* immediately above and the results of those actions; and

(c) that the Government of the United States ensure that no action is taken that might prejudice the rights of the Republic of Paraguay with respect to any decision this Court may render on the merits of the case";

and whereas it asks the Court moreover to consider its request as a matter of the greatest urgency "in view of the extreme gravity and immediacy of the threat that the authorities . . . will execute a Paraguayan citizen";

10. Whereas, on 3 April 1998, the Ambassador of Paraguay to the Netherlands addressed a letter to the President of the Court requesting the Court to fix an early date for a hearing on his Government's request for provisional measures, asking the Member of the Court who, in accordance with the provisions of Article 13, paragraph 1, and Article 32, paragraph 1, of the Rules of Court, would exercise the functions of President in the case to "call upon the United States of America to ensure that Mr. Breard is not put to death before the Court's ruling on Paraguay's request for provisional measures"; and indicating that he had been appointed as Agent of Paraguay for the purposes of the case;

11. Whereas, on 3 April 1998, the date on which the Application and the request for provisional measures were filed in the Registry, the Registrar advised the Government of the United States of the filing of those documents, communicated the text of them to that Government by facsimile and sent it a certified copy of the Application, in accordance with Article 40, paragraph 2, of the Statute of the Court and Article 38, paragraph 4, of the Rules of Court, together with a certified copy of the request for the indication of provisional measures, in accordance with Article 73, paragraph 2, of the Rules of Court; and whereas the Registrar also sent the Government of the United States a copy of the letter addressed that day to the President of the Court by the Agent of Paraguay;

12. Whereas, by identical letters dated 3 April 1998, the Vice-President of the Court addressed both Parties in the following terms:

"Exercising the functions of the presidency in terms of Articles 13 and 32 of the Rules of Court, and acting in conformity with Article 74, paragraph 4, of the said Rules, I hereby draw the attention of both Parties to the need to act in such a way as to enable any Order the Court will make on the request for provisional measures to have its appropriate effects";

and whereas, at a meeting held the same day with the representatives of both Parties, he advised them that the Court would hold public hearings on 7 April 1998 at 10 a.m., in order to afford the Parties the opportunity of presenting their observations on the request for provisional measures;

13. Whereas, by a letter dated 5 April 1998, received in the Registry on 6 April 1998, the Ambassador of the United States to the Netherlands informed the Court of the appointment of an Agent and a Co-Agent of his Government for the case;

14. Whereas, pending the notification under Article 40, paragraph 3, of the Statute of the Court and Article 42 of the Rules of Court, by transmission of the printed text, in two languages, of the Application to the Members of the United Nations and to other States entitled to appear before the Court, the Registrar, on 6 April 1998, informed those States of the filing of the Application and of its subject-matter, and of the request for the indication of provisional measures;

15. Whereas, on 6 April 1998, the Registrar, in accordance with Article 43 of the Rules of Court, addressed the notification provided for in Article 63, paragraph 1, of the Statute to the States, other than the Parties to the dispute, which on the basis of information supplied by the Secretary-General of the United Nations as depositary appeared to be parties to the Vienna Convention and to the Optional Protocol;

16. Whereas, at the public hearings held on 7 April 1998, in accordance with Article 74, paragraph 3, of the Rules of Court, oral statements on the request for the indication of provisional measures were presented by the Parties:

On behalf of Paraguay:	H.E. Mr. Manuel María Cáceres, Mr. Donald Francis Donovan, Mr. Barton Legum, Dr. José Emilio Gorostiaga;
On behalf of the United States:	Mr. David R. Andrews, Ms Catherine Brown, Mr. John R. Crook, Mr. Michael J. Matheson;

and whereas at the hearings a question was put by a Member of the Court, to which a reply was given orally and in writing;

* * *

17. Whereas, at the hearings, Paraguay reiterated the line of argument set forth in its Application and its request for the indication of provisional measures;

18. Whereas at the hearing, the United States argued that Mr. Breard's guilt was well established, and pointed out that the accused had admitted his guilt, which Paraguay did not dispute; whereas it recognized that Mr. Breard had not been informed, at the time of his arrest and trial, of his rights under Article 36, subparagraph 1 *(b)*, of the Vienna Convention, and indicated to the Court that this omission was not deliberate; whereas it nonetheless maintained that the person concerned had had all neces-

sary legal assistance, that he understood English well and that the assistance of consular officers would not have changed the outcome of the proceedings brought against him in any way; whereas, referring to State practice in these matters, it stated that the notification provided for by Article 36, subparagraph 1 *(b)*, of the Vienna Convention is unevenly made, and that when a claim is made for failure to notify, the only consequence is that apologies are presented by the Government responsible; and whereas it submitted that the automatic invalidation of the proceedings initiated and the return to the *status quo ante* as penalties for the failure to notify not only find no support in State practice, but would be unworkable;

19. Whereas the United States also indicated that the State Department had done everything in its power to help the Government of Paraguay as soon as it was informed of the situation in 1996; and whereas it stated that when, on 30 March 1998, Paraguay advised the Government of the United States of its intention to bring proceedings before the Court if the United States Government did not take steps to initiate consultation and to obtain a stay of execution for Mr. Breard, the Government of the United States had emphasized *inter alia* that a stay of execution depended exclusively on the United States Supreme Court and the Governor of Virginia;

20. Whereas the United States furthermore maintained that Paraguay's contention that the invalidation of the sentence of a person who had not been notified pursuant to Article 36, subparagraph 1 *(b)*, of the Vienna Convention could be required under that instrument, has no foundation in the relevant provisions, their *travaux préparatoires* or the practice of States, and that, in the event, Mr. Breard has not been prejudiced by the absence of notification; and whereas it pointed out that provisional measures should not be indicated where it appears that the Applicant's argument will not enable it to be successful on the merits;

21. Whereas the United States also stated that, when the Court indicates provisional measures under Article 41 of its Statute, it must take the rights of each of the Parties into consideration and ensure that it maintains a fair balance in protecting those rights; whereas that would not be the case if it acceded to Paraguay's request in these proceedings; and whereas the measures requested by Paraguay would prejudice the merits of the case;

22. Whereas the United States finally alleged that the indication of the provisional measures requested by Paraguay would be contrary to the interests of the States parties to the Vienna Convention and to those of the international community as a whole as well as to those of the Court, and would in particular be such as seriously to disrupt the criminal justice systems of the States parties to the Convention, given the risk of proliferation of cases; and whereas it stated in that connection that States have an overriding interest in avoiding external judicial intervention

which would interfere with the execution of a sentence passed at the end of an orderly process meeting the relevant human rights standards;

* * *

23. Whereas on a request for the indication of provisional measures the Court need not, before deciding whether or not to indicate them, finally satisfy itself that it has jurisdiction on the merits of the case, but whereas it may not indicate them unless the provisions invoked by the Applicant appear, prima facie, to afford a basis on which the jurisdiction of the Court might be founded;

24. Whereas Article I of the Optional Protocol, which Paraguay invokes as the basis of jurisdiction of the Court in this case, is worded as follows:

> "Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a party to the present Protocol";

25. Whereas, according to the information communicated by the Secretary-General of the United Nations as depositary, Paraguay and the United States are parties to the Vienna Convention and to the Optional Protocol, in each case without reservation;

26. Whereas Articles II and III of the aforementioned Protocol provide that within a period of two months after one party has notified the other of the existence of a dispute, the parties may agree to resort not to the International Court of Justice but to an arbitration tribunal or alternatively first to conciliation; but whereas these Articles

> "when read in conjunction with those of Article I and with the Preamble to the Protocols, make it crystal clear that they are not to be understood as laying down a precondition of the applicability of the precise and categorical provision contained in Article I establishing the compulsory jurisdiction of the Court in respect of disputes arising out of the interpretation or application of the Vienna Convention . . ." (*United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980*, pp. 25-26);

27. Whereas, in its Application and at the hearings, Paraguay stated that the issues in dispute between itself and the United States concern Articles 5 and 36 of the Vienna Convention and fall within the compulsory sjurisdiction of the Court under Article I of the Optional Protocol; and whereas it concluded from this that the Court has the jurisdiction necessary to indicate the provisional measures requested;

28. Whereas at the hearing, the United States contended, for its part, that Paraguay had not established that the Court had jurisdiction in these proceedings, even prima facie; whereas it argued that there is no dispute between the Parties as to the interpretation of Article 36, subparagraph 1 *(b)*, of the Vienna Convention and nor is there a dispute as to its application, since the United States recognizes that the notification provided for was not carried out; whereas the United States maintained that the objections raised by Paraguay to the proceedings brought against its national do not constitute a dispute concerning the interpretation or application of the Vienna Convention; and whereas it added that there was no entitlement to *restitutio in integrum* under the terms of that Convention;

29. Whereas the United States moreover indicated to the Court that it had expressed its regret to Paraguay for the failure to notify Mr. Breard of his right to consular access, engaged in consultations with Paraguay on the matter and taken steps to ensure future compliance with its obligations under the Vienna Convention at both the federal and state level;

30. Whereas Paraguay asserts that it is nevertheless entitled to *restitutio in integrum*, that any criminal liability currently imposed on Mr. Breard should accordingly be recognized as void by the legal authorities of the United States and that the *status quo ante* should be restored in that Mr. Breard should have the benefit of the provisions of the Vienna Convention in any renewed proceedings brought against him, no objection to his continued detention meanwhile being made by Paraguay; whereas however the United States believes that these measures are not required by the Vienna Convention, would contravene the understanding underlying the adoption of Article 36 as well as the uniform practice of States, and would put this Court in a position of acting as a universal supreme court of criminal appeals;

31. Whereas there exists a dispute as to whether the relief sought by Paraguay is a remedy available under the Vienna Convention, in particular in relation to Articles 5 and 36 thereof; and whereas this is a dispute arising out of the application of the Convention within the meaning of Article I of the Optional Protocol concerning the Compulsory Settlement of Disputes of 24 April 1963;

32. Whereas the United States claimed nevertheless that prima facie there is no jurisdiction for the Court in this case as Paraguay has no legally cognizable claim to the relief it seeks nor any prospect ultimately of prevailing on the merits, because no prejudice to Mr. Breard has occurred;

33. Whereas the existence of the relief sought by Paraguay under the Convention can only be determined at the stage of the merits; and

whereas the issue of whether any such remedy is dependent upon evidence of prejudice to the accused in his trial and sentence can equally only be decided upon at the merits;

34. Whereas the Court finds that, prima facie, it has jurisdiction under Article I of the aforesaid Optional Protocol to decide the dispute between Paraguay and the United States;

* *

35. Whereas the power of the Court to indicate provisional measures under Article 41 of its Statute is intended to preserve the respective rights of the parties pending its decision, and presupposes that irreparable prejudice shall not be caused to rights which are the subject of a dispute in judicial proceedings; whereas it follows that the Court must be concerned to preserve by such measures the rights which may subsequently be adjudged by the Court to belong either to the Applicant, or to the Respondent; and whereas such measures are only justified if there is urgency;

36. Whereas the Court will not order interim measures in the absence of "irreparable prejudice . . . to rights which are the subject of dispute . . ." (*Nuclear Tests (Australia* v. *France), Interim Protection, Order of 22 June 1973, I.C.J. Reports 1973*, p. 103; *United States Diplomatic and Consular Staff in Tehran, Provisional Measures, Order of 15 December 1979, I.C.J. Reports 1979*, p. 19, para. 36; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993*, p. 19, para. 34);

37. Whereas the execution of Mr. Breard is ordered for 14 April 1998; and whereas such an execution would render it impossible for the Court to order the relief that Paraguay seeks and thus cause irreparable harm to the rights it claims;

38. Whereas the issues before the Court in this case do not concern the entitlement of the federal states within the United States to resort to the death penalty for the most heinous crimes; and whereas, further, the function of this Court is to resolve international legal disputes between States, *inter alia* when they arise out of the interpretation or application of international conventions, and not to act as a court of criminal appeal;

* * *

39. Whereas, in the light of the aforementioned considerations, the Court finds that the circumstances require it to indicate, as a matter of urgency, provisional measures in accordance with Article 41 of its Statute;

40. Whereas measures indicated by the Court for a stay of execution would necessarily be provisional in nature and would not in any way pre-

judge findings the Court might make on the merits; and whereas the measures indicated would preserve the respective rights of Paraguay and of the United States; and whereas it is appropriate that the Court, with the co-operation of the Parties, ensure that any decision on the merits be reached with all possible expedition;

* * *

41. For these reasons,

THE COURT

Unanimously,

I. *Indicates* the following provisional measures:

The United States should take all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision in these proceedings, and should inform the Court of all the measures which it has taken in implementation of this Order;

II. *Decides*, that, until the Court has given its final decision, it shall remain seised of the matters which form the subject-matter of this Order.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this ninth day of April, one thousand nine hundred and ninety-eight, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Republic of Paraguay and the Government of the United States of America, respectively.

(Signed) Christopher G. WEERAMANTRY,
Vice-President.

(Signed) Eduardo VALENCIA-OSPINA,
Registrar.

President SCHWEBEL and Judges ODA and KOROMA append declarations to the Order of the Court.

(Initialled) C.G.W.

(Initialled) E.V.O.

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

CASE CONCERNING THE VIENNA CONVENTION ON CONSULAR RELATIONS

(PARAGUAY *v.* UNITED STATES OF AMERICA)

ORDER OF 10 NOVEMBER 1998

1998

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRE RELATIVE À LA CONVENTION DE VIENNE SUR LES RELATIONS CONSULAIRES

(PARAGUAY c. ÉTATS-UNIS D'AMÉRIQUE)

ORDONNANCE DU 10 NOVEMBRE 1998

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INTERNATIONAL COURT OF JUSTICE

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10 November 1998

CASE CONCERNING THE VIENNA CONVENTION ON CONSULAR RELATIONS

(PARAGUAY *v.* UNITED STATES OF AMERICA)

ORDER

Present: *Vice-President* WEERAMANTRY, *Acting President; President* SCHWEBEL; Judges ODA, BEDJAOUI, GUILLAUME, RANJEVA, HERCZEGH, SHI, FLEISCHHAUER, KOROMA, VERESHCHETIN, HIGGINS, PARRA-ARANGUREN, KOOIJMANS, REZEK; *Registrar* VALENCIA-OSPINA.

The International Court of Justice,

Composed as above,

Having regard to Article 48 of the Statute of the Court and to Article 89 of the Rules of Court,

Having regard to the Application filed in the Registry of the Court on 3 April 1998, whereby the Republic of Paraguay instituted proceedings against the United States of America for "violations of the Vienna Convention on Consular Relations [of 24 April 1963]" allegedly committed by the United States,

Having regard to the request for the indication of provisional measures submitted by Paraguay on 3 April 1998 and to the Order made by the Court on 9 April 1998, by which it indicated provisional measures,

Having regard to the Orders of 9 April 1998 and 8 June 1998, by which

the Vice-President of the Court, acting as President, fixed and subsequently extended the time-limits for the filing of written pleadings on the merits, and having regard to the Memorial filed by Paraguay on 9 October 1998;

Whereas, by a letter of 2 November 1998, filed in the Registry that same day, the Agent of Paraguay informed the Court that his Government wished to discontinue the proceedings with prejudice, and accordingly requested that the case be removed from the List;

Whereas a copy of this letter was immediately communicated to the Government of the United States, which was informed that the senior judge, acting pursuant to Articles 13, paragraph 3, and 89, paragraphs 2 and 3, of the Rules of Court, had fixed 30 November 1998 as the time-limit within which the United States could state whether it opposed the discontinuance;

Whereas, by a letter of 3 November 1998, a copy of which was filed in the Registry that same day, the Agent of the United States informed the Court that his Government concurred in Paraguay's discontinuance of the proceedings with prejudice, and in its request that the case be removed from the List,

Places on record the discontinuance by the Republic of Paraguay of the proceedings instituted by the Application filed on 3 April 1998; and

Orders that the case be removed from the List.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this tenth day of November, one thousand nine hundred and ninety-eight, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Republic of Paraguay and the Government of the United States of America, respectively.

(Signed) Christopher G. WEERAMANTRY,
Vice-President.

(Signed) Eduardo VALENCIA-OSPINA,
Registrar.

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

LaGrand Case

(GERMANY *v.* UNITED STATES OF AMERICA)

REQUEST FOR THE INDICATION OF PROVISIONAL MEASURES

ORDER OF 3 MARCH 1999

1999

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

Affaire LaGrand

(ALLEMAGNE c. ÉTATS-UNIS D'AMÉRIQUE)

DEMANDE EN INDICATION DE MESURES CONSERVATOIRES

ORDONNANCE DU 3 MARS 1999

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ORDER

LAGRAND
(GERMANY *v.* UNITED STATES OF AMERICA)

REQUEST FOR THE INDICATION OF PROVISIONAL MEASURES

LAGRAND
(ALLEMAGNE c. ÉTATS-UNIS D'AMÉRIQUE)

DEMANDE EN INDICATION DE MESURES CONSERVATOIRES

3 MARS 1999

ORDONNANCE

INTERNATIONAL COURT OF JUSTICE

YEAR 1999

1999
3 March
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3 March 1999

LAGRAND CASE

(GERMANY *v.* UNITED STATES OF AMERICA)

REQUEST FOR THE INDICATION OF PROVISIONAL MEASURES

ORDER

Present: *Vice-President* WEERAMANTRY, *Acting President*; *President* SCHWEBEL; *Judges* ODA, GUILLAUME, RANJEVA, HERCZEGH, SHI, FLEISCHHAUER, KOROMA, VERESHCHETIN, HIGGINS, PARRA-ARANGUREN, KOOIJMANS, REZEK; *Registrar* VALENCIA-OSPINA.

The International Court of Justice,

Composed as above,

After deliberation,

Having regard to Articles 41 and 48 of the Statute of the Court and to Articles 73, 74 and 75 of the Rules of Court,

Having regard to the Application filed in the Registry of the Court at 7.30 p.m. (The Hague time) on 2 March 1999, whereby the Federal Republic of Germany (hereinafter "Germany") instituted proceedings against the United States of America (hereinafter "the United States") for "violations of the Vienna Convention on Consular Relations [of 24 April 1963]" (hereinafter the "Vienna Convention") allegedly committed by the United States,

Makes the following Order:

1. Whereas, in its aforementioned Application, Germany bases the jurisdiction of the Court on Article 36, paragraph 1, of the Statute of the Court and on Article I of the Optional Protocol concerning the Compulsory Settlement of Disputes, which accompanies the Vienna Convention on Consular Relations ("the Optional Protocol");

2. Whereas, in the Application, it is stated that in 1982 the authorities of the State of Arizona detained two German nationals, Karl and Walter LaGrand; whereas it is maintained that these individuals were tried and sentenced to death without having been informed, as is required under Article 36, subparagraph 1 *(b)*, of the Vienna Convention, of their rights under that provision; whereas it is specified that that provision requires the competent authorities of a State party to advise, "without delay", a national of another State party whom such authorities arrest or detain of the national's right to consular assistance guaranteed by Article 36; whereas it is also alleged that the failure to provide the required notification precluded Germany from protecting its nationals' interests in the United States provided for by Articles 5 and 36 of the Vienna Convention at both the trial and the appeal level in the United States courts;

3. Whereas, in the Application, Germany states that it had been, until very recently, the contention of the authorities of the State of Arizona that they had been unaware of the fact that Karl and Walter LaGrand were nationals of Germany; whereas it had accepted that contention as true; however, during the proceedings before the Arizona Mercy Committee on 23 February 1999, the State Attorney admitted that the authorities of the State of Arizona had indeed been aware since 1982 that the two detainees were German nationals;

4. Whereas, in the same Application, Germany further states that Karl and Walter LaGrand, finally with the assistance of German consular officers, did claim violations of the Vienna Convention before the federal court of first instance; whereas that court, applying the municipal law doctrine of "procedural default", decided that, because the individuals in question had not asserted their rights under the Vienna Convention in the previous legal proceedings at state level, they could not assert them in the federal *habeas corpus* proceedings; and whereas the intermediate federal appellate court, last means of legal recourse in the United States available to them as of right, affirmed this decision;

5. Whereas, the Federal Republic of Germany asks the Court to adjudge and declare:

"(1) that the United States, in arresting, detaining, trying, convicting and sentencing Karl and Walter LaGrand, as described in

the preceding statement of facts, violated its international legal obligations to Germany, in its own right and in its right of diplomatic protection of its nationals, as provided by Articles 5 and 36 of the Vienna Convention,

(2) that Germany is therefore entitled to reparation,
(3) that the United States is under an international legal obligation not to apply the doctrine of 'procedural default' or any other doctrine of national law, so as to preclude the exercise of the rights accorded under Article 36 of the Vienna Convention; and
(4) that the United States is under an international obligation to carry out in conformity with the foregoing international legal obligations any future detention of or criminal proceedings against any other German national in its territory, whether by a constituent, legislative, executive, judicial or other power, whether that power holds a superior or subordinate position in the organization of the United States, and whether that power's functions are of an international or internal character;

and that, pursuant to the foregoing international legal obligations,

(1) the criminal liability imposed on Karl and Walter LaGrand in violation of international legal obligations is void, and should be recognized as void by the legal authorities of the United States;
(2) the United States should provide reparation, in the form of compensation and satisfaction, for the execution of Karl LaGrand on 24 February 1999;
(3) the United States should restore the *status quo ante* in the case of Walter LaGrand, that is re-establish the situation that existed before the detention of, proceedings against, and conviction and sentencing of that German national in violation of the United States' international legal obligation took place; and

(4) the United States should provide Germany a guarantee of the non-repetition of the illegal acts";

6. Whereas, on 2 March 1999, after having filed its Application, Germany also submitted an urgent request for the indication of provisional measures in order to protect its rights, pursuant to Article 41 of the Statute of the Court and to Articles 73, 74 and 75 of the Rules of Court;

7. Whereas, in its request for the indication of provisional measures, Germany refers to the basis of jurisdiction of the Court invoked in its Application, and to the facts set out and the submissions made therein; and whereas it affirms in particular that the United States has violated its obligations under the Vienna Convention;

8. Whereas, in its request for the indication of provisional measures of protection, Germany recalls that Karl LaGrand was executed on 24 February 1999, despite all appeals for clemency and numerous diplomatic interventions by the German Government at the highest level; whereas the date of execution of Walter LaGrand in the State of Arizona has been set for 3 March 1999; and whereas the request for the urgent indication of provisional measures is submitted in the interest of this latter individual; and whereas Germany emphasizes that:

> "The importance and sanctity of an individual human life are well established in international law. As recognized by Article 6 of the International Covenant on Civil and Political Rights, every human being has the inherent right to life and this right shall be protected by law";

and whereas Germany adds the following:

> "Under the grave and exceptional circumstances of this case, and given the paramount interest of Germany in the life and liberty of its nationals, provisional measures are urgently needed to protect the life of Germany's national Walter LaGrand and the ability of this Court to order the relief to which Germany is entitled in the case of Walter LaGrand, namely restoration of the *status quo ante*. Without the provisional measures requested, the United States will execute Walter LaGrand — as it did execute his brother Karl — before this Court can consider the merits of Germany's claims, and Germany will be forever deprived of the opportunity to have the *status quo ante* restored in the event of a judgment in its favour";

9. Whereas, Germany asks that, pending final judgment in this case, the Court indicate that:

> "The United States should take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings, and should inform the Court of all the measures which it has taken in implementation of that Order";

and whereas it asks the Court moreover to consider its request as a matter of the greatest urgency "in view of the extreme gravity and immediacy of the threat of execution of a German citizen";

10. Whereas, on 2 March 1999, the date on which the Application and the request for provisional measures were filed in the Registry, the Registrar advised the Government of the United States of the filing of those documents and sent it forthwith a certified copy of the Application, in accordance with Article 40, paragraph 2, of the Statute of the Court and Article 38, paragraph 4, of the Rules of Court, together with a certified copy of the request for the indication of provisional measures, in accordance with Article 73, paragraph 2, of the Rules of Court;

11. Whereas, by a letter dated 2 March 1999, the Vice-President of the Court addressed the Government of the United States in the following terms:

> "Exercising the functions of the presidency in terms of Articles 13 and 32 of the Rules of Court, and acting in conformity with Article 74, paragraph 4, of the said Rules, I hereby draw the attention of [the] Government [of the United States] to the need to act in such a way as to enable any Order the Court will make on the request for provisional measures to have its appropriate effects";

and whereas a copy of that letter was transmitted forthwith to the German Government;

12. Whereas, on 3 March 1999, at 9.00 a.m. (The Hague time), the Vice-President of the Court received the representatives of the Parties in order to obtain information from them with regard to the subsequent course of the proceedings; whereas the representative of the German Government stated that the Governor of the State of Arizona had rejected a recommendation by the Mercy Committee that the execution of Walter LaGrand should be stayed, so that the latter would in consequence be executed this same day at 3.00 p.m. (Phoenix time); whereas he emphasized the extreme urgency of this situation; and whereas, referring to the provisions of Article 75 of the Rules of Court, he asked the Court to indicate forthwith, and without holding any hearing, provisional measures *proprio motu*; and whereas the representative of the United States pointed out that the case had been the subject of lengthy proceedings in the United States, that the request for provisional measures submitted by Germany was made at a very late date and that the United States would have strong objections to any procedure such as that proposed only that very morning by the representative of Germany which would result in the Court making an Order *proprio motu* without having first duly heard the two Parties;

* * *

13. Whereas, on a request for the indication of provisional measures the Court need not, before deciding whether or not to indicate them, finally satisfy itself that it has jurisdiction on the merits of the case, but whereas it may not indicate them unless the provisions invoked by the Applicant appear, prima facie, to afford a basis on which the jurisdiction of the Court might be founded;

14. Whereas, Article I of the Optional Protocol, which Germany invokes as the basis of jurisdiction of the Court in this case, is worded as follows:

"Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol";

15. Whereas, according to the information communicated by the Secretary-General of the United Nations as depositary, Germany and the United States are parties to the Vienna Convention and to the Optional Protocol;

16. Whereas, in its Application Germany stated that the issues in dispute between itself and the United States concern Articles 5 and 36 of the Vienna Convention and fall within the compulsory jurisdiction of the Court under Article I of the Optional Protocol; and whereas it concluded from this that the Court has the jurisdiction necessary to indicate the provisional measures requested;

17. Whereas, in the light of the requests submitted by Germany in its Application and of the submissions made therein, there exists prima facie a dispute with regard to the application of the Convention within the meaning of Article I of the Optional Protocol;

18. Whereas, the Court has satisfied itself that, prima facie, it has jurisdiction under Article I of the aforesaid Optional Protocol to decide the dispute between Germany and the United States.

* *

19. Whereas, the sound administration of justice requires that a request for the indication of provisional measures founded on Article 73 of the Rules of Court be submitted in good time;

20. Whereas, Germany emphasizes that it did not become fully aware of the facts of the case until 24 February 1999 and that since then it has pursued its action at diplomatic level;

21. Whereas, under Article 75, paragraph 1, of the Rules of Court, the latter "may at any time decide to examine *proprio motu* whether the circumstances of the case require the indication of provisional measures which ought to be taken or complied with by any or all of the parties"; whereas a provision of this kind has substantially featured in the Rules of Court since 1936, and whereas, if the Court has not, to date, made use of the power conferred upon it by this provision, the latter appears nonetheless to be clearly established; whereas the Court may make use of this power, irrespective of whether or not it has been seised by the parties of a request for the indication of provisional measures; whereas in such a case it may, in the event of extreme urgency, proceed without holding oral hearings; and whereas it is for the Court to decide in each case if, in the light of the particular circumstances of the case, it should make use of the said power;

22. Whereas the power of the Court to indicate provisional measures

under Article 41 of its Statute is intended to preserve the respective rights of the parties pending its decision, and presupposes that irreparable prejudice shall not be caused to rights which are the subject of a dispute in judicial proceedings; whereas it follows that the Court must be concerned to preserve by such measures the rights which may subsequently be adjudged by the Court to belong either to the Applicant, or to the Respondent; and whereas such measures are only justified if there is urgency;

23. Whereas the Court will not order interim measures in the absence of "irreparable prejudice . . . to rights which are the subject of dispute . . ." (*Nuclear Tests (Australia* v. *France), Interim Protection, Order of 22 June 1973, I.C.J. Reports 1973*, p. 103; *United States Diplomatic and Consular Staff in Tehran, Provisional Measures, Order of 15 December 1979, I.C.J. Reports 1979*, p. 19, para. 36; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993*, p. 19, para. 34); *Vienna Convention on Consular Relations (Paraguay* v. *United States of America), Provisional Measures, Order of 9 April 1998*, p. 257, para. 36);

24. Whereas the execution of Walter LaGrand is ordered for 3 March 1999; and whereas such an execution would cause irreparable harm to the rights claimed by Germany in this particular case;

25. Whereas the issues before the Court in this case do not concern the entitlement of the federal states within the United States to resort to the death penalty for the most heinous crimes; and whereas, further, the function of this Court is to resolve international legal disputes between States, *inter alia* when they arise out of the interpretation or application of international conventions, and not to act as a court of criminal appeal;

* * *

26. Whereas, in the light of the aforementioned considerations, the Court finds that the circumstances require it to indicate, as a matter of the greatest urgency and without any other proceedings, provisional measures in accordance with Article 41 of its Statute and with Article 75, paragraph 1, of its Rules;

27. Whereas measures indicated by the Court for a stay of execution would necessarily be provisional in nature and would not in any way prejudge findings the Court might make on the merits; and whereas such measures would preserve the respective rights of Germany and of the United States; and whereas it is appropriate that the Court, with the cooperation of the Parties, ensure that any decision on the merits be reached with all possible expedition;

28. Whereas the international responsibility of a State is engaged by the action of the competent organs and authorities acting in that State, whatever they may be; whereas the United States should take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings; whereas, according to the information available to the Court, implementation of the measures indicated in the present Order falls within the jurisdiction of the Governor of Arizona; whereas the Government of the United States is consequently under the obligation to transmit the present Order to the said Governor; whereas the Governor of Arizona is under the obligation to act in conformity with the international undertakings of the United States;

* * *

29. For these reasons,

THE COURT,

Unanimously,

I. *Indicates* the following provisional measures:

(a) The United States of America should take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings, and should inform the Court of all the measures which it has taken in implementation of this Order;

(b) The Government of the United States of America should transmit this Order to the Governor of the State of Arizona.

II. *Decides* that, until the Court has given its final decision, it shall remain seised of the matters which form the subject-matter of this Order.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this third day of March, one thousand nine hundred and ninety-nine, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Federal Republic of Germany and the Government of the United States of America, respectively.

(Signed) Christopher G. WEERAMANTRY,
Vice-President.

(Signed) Eduardo VALENCIA-OSPINA,
Registrar.

Judge ODA appends a declaration to the Order of the Court.

President SCHWEBEL appends a separate opinion to the Order of the Court.

(Initialled) C.G.W.
(Initialled) E.V.O.

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

LaGrand Case

(GERMANY *v.* UNITED STATES OF AMERICA)

JUDGMENT OF 27 JUNE 2001

2001

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

Affaire LaGrand

(ALLEMAGNE c. ÉTATS-UNIS D'AMÉRIQUE)

ARRÊT DU 27 JUIN 2001

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JUDGMENT

LAGRAND
(GERMANY *v.* UNITED STATES OF AMERICA)

LAGRAND
(ALLEMAGNE c. ÉTATS-UNIS D'AMÉRIQUE)

27 JUIN 2001

ARRÊT

INTERNATIONAL COURT OF JUSTICE

YEAR 2001

2001
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No. 104

27 June 2001

LaGrand Case

(GERMANY *v.* UNITED STATES OF AMERICA)

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* *

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* *

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* *

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* *

Germany's second submission — Question of disregard by United States of its legal obligation under Article 36, paragraph 2, of Convention.

Argument of United States that Article 36, paragraph 2, applicable only to rights of sending State.

"Procedural default" rule — Distinction to be drawn between rule as such and application in present case.

* *

Germany's third submission — Question of disregard by United States of its legal obligation to comply with Order indicating provisional measures of 3 March 1999.

Court called upon to rule expressly on question of legal effects of orders under Article 41 of Statute — Interpretation of that provision — Comparison of French and English texts — French and English versions of Statute "equally authentic" by virtue of Article 111 of United Nations Charter — Article 33, paragraph 4, of Vienna Convention on Law of Treaties — Object and purpose of Statute — Context — Principle that party to legal proceedings must abstain from any measure which might aggravate or extend the dispute — Preparatory work of Article 41 — Article 94 of United Nations Charter.

Question of binding nature of Order of 3 March 1999 — Measures taken by United States to give effect to Order — No request for reparation in Germany's third submission — Time pressure due to circumstances in which proceedings were instituted.

* *

Germany's fourth submission — Question of obligation to provide certain assurances of non-repetition.

General request for assurance of non-repetition — Measures taken by United States to prevent recurrence of violation of Article 36, paragraph 1 (b) — Commitment undertaken by United States to ensure implementation of specific measures adopted in performance of obligations under that provision.

Consideration of other assurances requested by Germany — Germany's characterization of individual right provided for in Article 36, paragraph 1, as human right — Court's power to determine existence of violation of international obligation and, if necessary, to hold that domestic law has caused violation — United States having apologized to Germany for breach of Article 36, paragraph 1, of Convention — Germany not having requested material reparation for injury to itself and to LaGrand brothers — Question of review and reconsideration of certain sentences.

JUDGMENT

Present: *President* GUILLAUME; *Vice-President* SHI; *Judges* ODA, BEDJAOUI, RANJEVA, HERCZEGH, FLEISCHHAUER, KOROMA, VERESHCHETIN, HIGGINS, PARRA-ARANGUREN, KOOIJMANS, REZEK, AL-KHASAWNEH, BUERGENTHAL; *Registrar* COUVREUR.

In the LaGrand case,

between

the Federal Republic of Germany,

represented by

Mr. Gerhard Westdickenberg, Director General for Legal Affairs and Legal Adviser, Federal Foreign Office of the Federal Republic of Germany,

H.E. Mr. Eberhard U. B. von Puttkamer, Ambassador of the Federal Republic of Germany to the Kingdom of the Netherlands,

as Agents;

Mr. Bruno Simma, Professor of Public International Law at the University of Munich,

as Co-Agent and Counsel;

Mr. Pierre-Marie Dupuy, Professor of Public International Law at the University of Paris (Panthéon-Assas) and at the European University Institute in Florence,
Mr. Donald Francis Donovan, Debevoise & Plimpton, New York,
Mr. Hans-Peter Kaul, Head of the Public International Law Division, Federal Foreign Office of the Federal Republic of Germany,

Mr. Daniel Khan, University of Munich,
Mr. Andreas Paulus, University of Munich,

as Counsel;

Mr. Eberhard Desch, Federal Ministry of Justice of the Federal Republic of Germany,
Mr. S. Johannes Trommer, Embassy of the Federal Republic of Germany in the Netherlands,
Mr. Andreas Götze, Federal Foreign Office of the Federal Republic of Germany,

as Advisers;

Ms Fiona Sneddon,

as Assistant,

and

the United States of America,

represented by

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

as Agent;

Ms Catherine W. Brown, Assistant Legal Adviser for Consular Affairs, United States Department of State,
Mr. D. Stephen Mathias, Assistant Legal Adviser for United Nations Affairs, United States Department of State,

as Deputy Agents;

The Honourable Janet Napolitano, Attorney General, State of Arizona,
Mr. Michael J. Matheson, Professor of International Law, School of Advanced International Studies, Johns Hopkins University; former Acting Legal Adviser, United States Department of State,

Mr. Theodor Meron, Counsellor on International Law, United States Department of State; Charles L. Denison Professor of International Law, New York University; Associate Member of the Institute of International Law,

Mr. Stefan Trechsel, Professor of Criminal Law and Procedure, University of Zurich Faculty of Law,

as Counsel and Advocates;

Mr. Shabtai Rosenne, Member of the Israel Bar; Honorary Member of the American Society of International Law; Member of the Institute of International Law,
Ms Norma B. Martens, Assistant Attorney General, State of Arizona,

Mr. Paul J. McMurdie, Assistant Attorney General, State of Arizona,
Mr. Robert J. Erickson, Principal Deputy Chief, Appellate Section, Criminal Division, United States Department of Justice,

Mr. Allen S. Weiner, Counsellor for Legal Affairs, Embassy of the United States of America in the Netherlands,
Ms Jessica R. Holmes, Attaché, Office of the Counsellor for Legal Affairs, Embassy of the United States of America in the Netherlands,

as Counsel,

THE COURT,

composed as above,

after deliberation,

delivers the following Judgment:

1. On 2 March 1999 the Federal Republic of Germany (hereinafter referred to as "Germany") filed in the Registry of the Court an Application instituting proceedings against the United States of America (hereinafter referred to as the "United States") for "violations of the Vienna Convention on Consular Relations [of 24 April 1963]" (hereinafter referred to as the "Vienna Convention").

In its Application, Germany based the jurisdiction of the Court on Article 36, paragraph 1, of the Statute of the Court and on Article I of the Optional Protocol concerning the Compulsory Settlement of Disputes, which accompanies the Vienna Convention (hereinafter referred to as the "Optional Protocol").

2. Pursuant to Article 40, paragraph 2, of the Statute, the Application was forthwith communicated to the Government of the United States; and, in accordance with paragraph 3 of that Article, all States entitled to appear before the Court were notified of the Application.

3. On 2 March 1999, the day on which the Application was filed, the German Government also filed in the Registry of the Court a request for the indication of provisional measures based on Article 41 of the Statute and Articles 73, 74 and 75 of the Rules of Court.

By a letter dated 2 March 1999, the Vice-President of the Court, acting President in the case, addressed the Government of the United States in the following terms:

> "Exercising the functions of the presidency in terms of Articles 13 and 32 of the Rules of Court, and acting in conformity with Article 74, paragraph 4, of the said Rules, I hereby draw the attention of [the] Government [of the United States] to the need to act in such a way as to enable any Order the Court will make on the request for provisional measures to have its appropriate effects."

By an Order of 3 March 1999, the Court indicated certain provisional measures (see paragraph 32 below).

4. In accordance with Article 43 of the Rules of Court, the Registrar sent the notification referred to in Article 63, paragraph 1, of the Statute to all States parties to the Vienna Convention or to that Convention and the Optional Protocol.

5. By an Order of 5 March 1999, the Court, taking account of the views of the Parties, fixed 16 September 1999 and 27 March 2000, respectively, as the time-limits for the filing of a Memorial by Germany and of a Counter-Memorial by the United States.

The Memorial and Counter-Memorial were duly filed within the time-limits so prescribed.

6. By letter of 26 October 2000, the Agent of Germany expressed his Government's desire to produce five new documents in accordance with Article 56 of the Rules.

By letter of 6 November 2000, the Agent of the United States informed the Court that his Government consented to the production of the first and second documents, but not to that of the third, fourth and fifth documents.

The Court decided, pursuant to Article 56, paragraph 2, of the Rules, to authorize the production of the latter group of documents by Germany, it being understood that the United States would have the opportunity, in accordance with paragraph 3 of that Article, to comment subsequently thereon and to submit documents in support of those comments. That decision was duly communicated to the Parties by letters from the Registrar dated 9 November 2000.

7. Pursuant to Article 53, paragraph 2, of the Rules, the Court, after ascertaining the views of the Parties, decided that copies of the pleadings and documents annexed would be made available to the public at the opening of the oral proceedings.

8. Public hearings were held from 13 to 17 November 2000, at which the Court heard the oral arguments and replies of:

For Germany: Mr. Gerhard Westdickenberg,
Mr. Bruno Simma,
Mr. Daniel Khan,
Mr. Hans-Peter Kaul,
Mr. Andreas Paulus,
Mr. Donald Francis Donovan,
Mr. Pierre-Marie Dupuy.

For the United States: Mr. James H. Thessin,
The Honourable Janet Napolitano,
Mr. Theodor Meron,
Ms Catherine W. Brown,
Mr. D. Stephen Mathias,
Mr. Stefan Trechsel,
Mr. Michael J. Matheson.

9. At the hearings, Members of the Court put questions to Germany, to which replies were given in writing, in accordance with Article 61, paragraph 4, of the Rules of Court.

In addition, the United States, acting within the time-limit accorded it for this purpose, commented on the new documents filed by Germany on 26 October 2000 (see paragraph 6 above) and produced documents in support of those comments.

*

10. In its Application, Germany formulated the decision requested in the following terms:

> "Accordingly the Federal Republic of Germany asks the Court to adjudge and declare
>
> (1) that the United States, in arresting, detaining, trying, convicting and sentencing Karl and Walter LaGrand, as described in the preceding statement of facts, violated its international legal obligations to Germany, in its own right and in its right of diplomatic protection of its nationals, as provided by Articles 5 and 36 of the Vienna Convention,
>
> (2) that Germany is therefore entitled to reparation,
>
> (3) that the United States is under an international legal obligation not to

apply the doctrine of 'procedural default' or any other doctrine of national law, so as to preclude the exercise of the rights accorded under Article 36 of the Vienna Convention; and

(4) that the United States is under an international obligation to carry out in conformity with the foregoing international legal obligations any future detention of or criminal proceedings against any other German national in its territory, whether by a constituent, legislative, executive, judicial or other power, whether that power holds a superior or subordinate position in the organization of the United States, and whether that power's functions are of an international or internal character;

and that, pursuant to the foregoing international legal obligations,

(1) the criminal liability imposed on Karl and Walter LaGrand in violation of international legal obligations is void, and should be recognized as void by the legal authorities of the United States;
(2) the United States should provide reparation, in the form of compensation and satisfaction, for the execution of Karl LaGrand on 24 February 1999;
(3) the United States should restore the *status quo ante* in the case of Walter LaGrand, that is re-establish the situation that existed before the detention of, proceedings against, and conviction and sentencing of that German national in violation of the United States' international legal obligation took place; and
(4) the United States should provide Germany a guarantee of the non-repetition of the illegal acts."

11. In the course of the written proceedings, the following submissions were presented by the Parties:

On behalf of the Government of Germany,

in the Memorial:

"Having regard to the facts and points of law set forth in the present Memorial, and without prejudice to such elements of fact and law and to such evidence as may be submitted at a later time, and likewise without prejudice to the right to supplement and amend the present Submissions, the Federal Republic of Germany respectfully requests the Court to adjudge and declare

(1) that the United States, by not informing Karl and Walter LaGrand without delay following their arrest of their rights under Article 36 subparagraph 1 *(b)* of the Vienna Convention on Consular Relations, and by depriving Germany of the possibility of rendering consular assistance, which ultimately resulted in the execution of Karl and Walter LaGrand, violated its international legal obligations to Germany, in its own right and in its right of diplomatic protection of its nationals, under Articles 5 and 36 paragraph 1 of the said Convention;

(2) that the United States, by applying rules of its domestic law, in par-

ticular the doctrine of procedural default, which barred Karl and Walter LaGrand from raising their claims under the Vienna Convention on Consular Relations, and by ultimately executing them, violated its international legal obligation to Germany under Article 36 paragraph 2 of the Vienna Convention to give full effect to the purposes for which the rights accorded under Article 36 of the said Convention are intended;

(3) that the United States, by failing to take all measures at its disposal to ensure that Walter LaGrand was not executed pending the final decision of the International Court of Justice on the matter, violated its international legal obligation to comply with the Order on provisional measures issued by the Court on 3 March 1999, and to refrain from any action which might interfere with the subject matter of a dispute while judicial proceedings are pending;

and, pursuant to the foregoing international legal obligations,

(4) that the United States shall provide Germany a guarantee that it will not repeat its illegal acts and ensure that, in any future cases of detention of or criminal proceedings against German nationals, United States domestic law and practice will not constitute a bar to the effective exercise of the rights under Article 36 of the Vienna Convention on Consular Relations."

On behalf of the Government of the United States,

in the Counter-Memorial:

"Accordingly, on the basis of the facts and arguments set forth in this Counter-Memorial, and without prejudice to the right further to amend and supplement these submissions in the future, the United States asks the Court to adjudge and declare that:

(1) There was a breach of the United States obligation to Germany under Article 36 (1) *(b)* of the Vienna Convention on Consular Relations, in that the competent authorities of the United States did not promptly give to Karl and Walter LaGrand the notification required by that Article, and that the United States has apologized to Germany for this breach, and is taking substantial measures aimed at preventing any recurrence; and

(2) That all other claims and submissions of the Federal Republic of Germany are dismissed."

12. At the oral proceedings, the following submissions were presented by the Parties:

On behalf of the Government of Germany,

"The Federal Republic of Germany respectfully requests the Court to adjudge and declare

(1) that the United States, by not informing Karl and Walter LaGrand without delay following their arrest of their rights under Article 36, subparagraph 1 *(b)*, of the Vienna Convention on Consular Relations, and by depriving Germany of the possibility of rendering con-

sular assistance, which ultimately resulted in the execution of Karl and Walter LaGrand, violated its international legal obligations to Germany, in its own right and in its right of diplomatic protection of its nationals, under Articles 5 and 36, paragraph 1, of the said Convention;

(2) that the United States, by applying rules of its domestic law, in particular the doctrine of procedural default, which barred Karl and Walter LaGrand from raising their claims under the Vienna Convention on Consular Relations, and by ultimately executing them, violated its international legal obligation to Germany under Article 36, paragraph 2, of the Vienna Convention to give full effect to the purposes for which the rights accorded under Article 36 of the said Convention are intended;

(3) that the United States, by failing to take all measures at its disposal to ensure that Walter LaGrand was not executed pending the final decision of the International Court of Justice on the matter, violated its international legal obligation to comply with the Order on provisional measures issued by the Court on 3 March 1999, and to refrain from any action which might interfere with the subject-matter of a dispute while judicial proceedings are pending;

and, pursuant to the foregoing international legal obligations,

(4) that the United States shall provide Germany an assurance that it will not repeat its unlawful acts and that, in any future cases of detention of or criminal proceedings against German nationals, the United States will ensure in law and practice the effective exercise of the rights under Article 36 of the Vienna Convention on Consular Relations. In particular in cases involving the death penalty, this requires the United States to provide effective review of and remedies for criminal convictions impaired by a violation of the rights under Article 36."

On behalf of the Government of the United States,

"The United States of America respectfully requests the Court to adjudge and declare that:

(1) There was a breach of the United States obligation to Germany under Article 36, paragraph 1 *(b)*, of the Vienna Convention on Consular Relations, in that the competent authorities of the United States did not promptly give to Karl and Walter LaGrand the notification required by that Article, and that the United States has apologized to Germany for this breach, and is taking substantial measures aimed at preventing any recurrence; and

(2) All other claims and submissions of the Federal Republic of Germany are dismissed."

* * *

13. Walter LaGrand and Karl LaGrand were born in Germany in

1962 and 1963 respectively, and were German nationals. In 1967, when they were still young children, they moved with their mother to take up permanent residence in the United States. They returned to Germany only once, for a period of about six months in 1974. Although they lived in the United States for most of their lives, and became the adoptive children of a United States national, they remained at all times German nationals, and never acquired the nationality of the United States. However, the United States has emphasized that both had the demeanour and speech of Americans rather than Germans, that neither was known to have spoken German, and that they appeared in all respects to be native citizens of the United States.

14. On 7 January 1982, Karl LaGrand and Walter LaGrand were arrested in the United States by law enforcement officers on suspicion of having been involved earlier the same day in an attempted armed bank robbery in Marana, Arizona, in the course of which the bank manager was murdered and another bank employee seriously injured. They were subsequently tried before the Superior Court of Pima County, Arizona, which, on 17 February 1984, convicted them both of murder in the first degree, attempted murder in the first degree, attempted armed robbery and two counts of kidnapping. On 14 December 1984, each was sentenced to death for first degree murder and to concurrent sentences of imprisonment for the other charges.

15. At all material times, Germany as well as the United States were parties to both the Vienna Convention on Consular Relations and the Optional Protocol to that Convention. Article 36, paragraph 1 *(b)*, of the Vienna Convention provides that:

> "if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph."

It is not disputed that at the time the LaGrands were convicted and sentenced, the competent United States authorities had failed to provide the LaGrands with the information required by this provision of the Vienna Convention, and had not informed the relevant German consular post of the LaGrands' arrest. The United States concedes that the competent authorities failed to do so, even after becoming aware that the LaGrands were German nationals and not United States nationals, and admits that

the United States has therefore violated its obligations under this provision of the Vienna Convention.

16. However, there is some dispute between the Parties as to the time at which the competent authorities in the United States became aware of the fact that the LaGrands were German nationals. Germany argues that the authorities of Arizona were aware of this from the very beginning, and in particular that probation officers knew by April 1982. The United States argues that at the time of their arrest, neither of the LaGrands identified himself to the arresting authorities as a German national, and that Walter LaGrand affirmatively stated that he was a United States citizen. The United States position is that its "competent authorities" for the purposes of Article 36, paragraph 1 *(b)*, of the Vienna Convention were the arresting and detaining authorities, and that these became aware of the German nationality of the LaGrands by late 1984, and possibly by mid-1983 or earlier, but in any event not at the time of their arrest in 1982. Although other authorities, such as immigration authorities or probation officers, may have known this even earlier, the United States argues that these were not "competent authorities" for the purposes of this provision of the Vienna Convention. The United States has also suggested that at the time of their arrest, the LaGrands may themselves have been unaware that they were not nationals of the United States.

17. At their trial, the LaGrands were represented by counsel assigned by the court, as they were unable to afford legal counsel of their own choice. Their counsel at trial did not raise the issue of non-compliance with the Vienna Convention, and did not themselves contact the German consular authorities.

18. The convictions and sentences pronounced by the Superior Court of Pima County, Arizona, were subsequently challenged by the LaGrands in three principal sets of legal proceedings.

19. The first set of proceedings consisted of appeals against the convictions and sentences to the Supreme Court of Arizona, which were rejected by that court on 30 January 1987. The United States Supreme Court, in the exercise of its discretion, denied applications by the LaGrands for further review of these judgments on 5 October 1987.

20. The second set of proceedings involved petitions by the LaGrands for post-conviction relief, which were denied by an Arizona state court in 1989. Review of this decision was denied by the Supreme Court of Arizona in 1990, and by the United States Supreme Court in 1991.

21. At the time of these two sets of proceedings, the LaGrands had

still not been informed by the competent United States authorities of their rights under Article 36, paragraph 1 *(b)*, of the Vienna Convention, and the German consular post had still not been informed of their arrest. The issue of the lack of consular notification, which had not been raised at trial, was also not raised in these two sets of proceedings.

22. The relevant German consular post was only made aware of the case in June 1992 by the LaGrands themselves, who had learnt of their rights from other sources, and not from the Arizona authorities. In December 1992, and on a number of subsequent occasions between then and February 1999, an official of the Consulate-General of Germany in Los Angeles visited the LaGrands in prison. Germany claims that it subsequently helped the LaGrands' attorneys to investigate the LaGrands' childhood in Germany, and to raise the issue of the omission of consular advice in further proceedings before the federal courts.

23. The LaGrands commenced a third set of legal proceedings by filing applications for writs of *habeas corpus* in the United States District Court for the District of Arizona, seeking to have their convictions — or at least their death sentences — set aside. In these proceedings they raised a number of different claims, which were rejected by that court in orders dated 24 January 1995 and 16 February 1995. One of these claims was that the United States authorities had failed to notify the German consulate of their arrest, as required by the Vienna Convention. This claim was rejected on the basis of the "procedural default" rule. According to the United States, this rule:

> "is a federal rule that, before a state criminal defendant can obtain relief in federal court, the claim must be presented to a state court. If a state defendant attempts to raise a new issue in a federal *habeas corpus* proceeding, the defendant can only do so by showing cause and prejudice. Cause is an external impediment that prevents a defendant from raising a claim and prejudice must be obvious on its face. One important purpose of this rule is to ensure that the state courts have an opportunity to address issues going to the validity of state convictions before the federal courts intervene."

The United States District Court held that the LaGrands had not shown an objective external factor that prevented them from raising the issue of the lack of consular notification earlier. On 16 January 1998, this judgment was affirmed on appeal by the United States Court of Appeals,

Ninth Circuit, which also held that the LaGrands' claim relating to the Vienna Convention was "procedurally defaulted", as it had not been raised in any of the earlier proceedings in state courts. On 2 November 1998, the United States Supreme Court denied further review of this judgment.

24. On 21 December 1998, the LaGrands were formally notified by the United States authorities of their right to consular access.

25. On 15 January 1999, the Supreme Court of Arizona decided that Karl LaGrand was to be executed on 24 February 1999, and that Walter LaGrand was to be executed on 3 March 1999. Germany claims that the German Consulate learned of these dates on 19 January 1999.

26. In January and early February 1999, various interventions were made by Germany seeking to prevent the execution of the LaGrands. In particular, the German Foreign Minister and German Minister of Justice wrote to their respective United States counterparts on 27 January 1999; the German Foreign Minister wrote to the Governor of Arizona on the same day; the German Chancellor wrote to the President of the United States and to the Governor of Arizona on 2 February 1999; and the President of the Federal Republic of Germany wrote to the President of the United States on 5 February 1999. These letters referred to German opposition to capital punishment generally, but did not raise the issue of the absence of consular notification in the case of the LaGrands. The latter issue was, however, raised in a further letter, dated 22 February 1999, two days before the scheduled date of execution of Karl LaGrand, from the German Foreign Minister to the United States Secretary of State.

27. On 23 February 1999, the Arizona Board of Executive Clemency rejected an appeal for clemency by Karl LaGrand. Under the law of Arizona, this meant that the Governor of Arizona was prevented from granting clemency.

28. On the same day, the Arizona Superior Court in Pima County rejected a further petition by Walter LaGrand, based *inter alia* on the absence of consular notification, on the ground that these claims were "procedurally precluded".

29. On 24 February 1999, certain last-minute federal court proceedings brought by Karl LaGrand ultimately proved to be unsuccessful. In the course of these proceedings the United States Court of Appeals, Ninth Circuit, again held the issue of failure of consular notification to be procedurally defaulted. Karl LaGrand was executed later that same day.

30. On 2 March 1999, the day before the scheduled date of execution of Walter LaGrand, at 7.30 p.m. (The Hague time), Germany filed in the Registry of this Court the Application instituting the present proceedings against the United States (see paragraph 1 above), accompanied by a request for the following provisional measures:

"The United States should take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings, and should inform the Court of all the measures which it has taken in implementation of that Order."

By a letter of the same date, the German Foreign Minister requested the Secretary of State of the United States "to urge [the] Governor [of Arizona] for a suspension of Walter LaGrand's execution pending a ruling by the International Court of Justice".

31. On the same day, the Arizona Board of Executive Clemency met to consider the case of Walter LaGrand. It recommended against a commutation of his death sentence, but recommended that the Governor of Arizona grant a 60-day reprieve having regard to the Application filed by Germany in the International Court of Justice. Nevertheless, the Governor of Arizona decided, "in the interest of justice and with the victims in mind", to allow the execution of Walter LaGrand to go forward as scheduled.

32. In an Order of 3 March 1999, this Court found that the circumstances required it to indicate, as a matter of the greatest urgency and without any other proceedings, provisional measures in accordance with Article 41 of its Statute and with Article 75, paragraph 1, of its Rules (*I.C.J. Reports 1999 (I)*, p. 15, para. 26); it indicated provisional measures in the following terms:

"*(a)* The United States of America should take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings, and should inform the Court of all the measures which it has taken in implementation of this Order;

(b) The Government of the United States of America should transmit this Order to the Governor of the State of Arizona."

33. On the same day, proceedings were brought by Germany in the United States Supreme Court against the United States and the Governor of Arizona, seeking *inter alia* to enforce compliance with this Court's Order indicating provisional measures. In the course of these proceedings, the United States Solicitor General as counsel of record took the position, *inter alia*, that "an order of the International Court of Justice indicating provisional measures is not binding and does not furnish a basis for judicial relief". On the same date, the United States Supreme Court dismissed the motion by Germany, on the ground of the tardiness of Germany's application and of jurisdictional barriers under United States domestic law.

34. On that same day, proceedings were also instituted in the United

States Supreme Court by Walter LaGrand. These proceedings were decided against him. Later that day, Walter LaGrand was executed.

* * *

35. The Court must as a preliminary matter deal with certain issues, which were raised by the Parties in these proceedings, concerning the jurisdiction of the Court in relation to Germany's Application, and the admissibility of its submissions.

* *

36. In relation to the jurisdiction of the Court, the United States, without having raised preliminary objections under Article 79 of the Rules of Court, nevertheless presented certain objections thereto.

Germany bases the jurisdiction of the Court on Article I of the Optional Protocol, which reads as follows:

> "Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol."

Germany contends that the

> "proceedings instituted by [it] in the present case raise questions of the interpretation and application of the Vienna Convention on Consular Relations and of the legal consequences arising from the non-observance on the part of the United States of certain of its provisions vis-à-vis Germany and two of its nationals".

Accordingly, Germany states that all four of its submissions

> "are covered by one and the same jurisdictional basis, namely Art. I of the Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes of 24 April 1963".

*

37. The Court will first examine the question of its jurisdiction with respect to the first submission of Germany. Germany relies on paragraph 1 of Article 36 of the Vienna Convention, which provides:

> "With a view to facilitating the exercise of consular functions relating to nationals of the sending State:

(a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;

(b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph;

(c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgement. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action."

38. Germany alleges that the failure of the United States to inform the LaGrand brothers of their right to contact the German authorities "prevented Germany from exercising its rights under Art. 36 (1) *(a)* and *(c)* of the Convention" and violated "the various rights conferred upon the sending State vis-à-vis its nationals in prison, custody or detention as provided for in Art. 36 (1) *(b)* of the Convention". Germany further alleges that by breaching its obligations to inform, the United States also violated individual rights conferred on the detainees by Article 36, paragraph 1 *(a)*, second sentence, and by Article 36, paragraph 1 *(b)*. Germany accordingly claims that it "was injured in the person of its two nationals", a claim which Germany raises "as a matter of diplomatic protection on behalf of Walter and Karl LaGrand".

39. The United States acknowledges that "there was a breach of the U.S. obligation . . . to inform the LaGrand brothers that they could ask that a German consular post be notified of their arrest and detention". It does not deny that this violation of Article 36, paragraph 1 *(b)*, has given rise to a dispute between the two States and recognizes that the Court has

jurisdiction under the Optional Protocol to hear this dispute in so far as it concerns Germany's own rights.

40. Concerning Germany's claims of violation of Article 36, paragraph 1 *(a)* and *(c)*, the United States however calls these claims "particularly misplaced" on the grounds that the "underlying conduct complained of is the same" as the claim of the violation of Article 36, paragraph 1 *(b)*. It contends, moreover, that "to the extent that this claim by Germany is based on the general law of diplomatic protection, it is not within the Court's jurisdiction" under the Optional Protocol because it "does not concern the interpretation or application of the Vienna Convention". The United States points to the distinction between jurisdiction over treaties and jurisdiction over customary law and observes that "[e]ven if a treaty norm and a customary norm were to have exactly the same content", each would have its "separate applicability". It contests the German assertion that diplomatic protection "enters through the intermediary of the Vienna Convention" and submits:

> "the Vienna Convention deals with consular assistance . . . it does not deal with diplomatic protection. Legally, a world of difference exists between the right of the consul to assist an incarcerated national of his country, and the wholly different question whether the State can espouse the claims of its national through diplomatic protection. The former is within the jurisdiction of the Court under the Optional Protocol; the latter is not . . . Germany based its right of diplomatic protection on customary law . . . [T]his case comes before this Court not under Article 36, paragraph 2, of its Statute, but under Article 36, paragraph 1. Is it not obvious . . . that whatever rights Germany has under customary law, they do not fall within the jurisdiction of this Court under the Optional Protocol?"

41. Germany responds that the breach of paragraph 1 *(a)* and *(c)* of Article 36 must be distinguished from that of paragraph 1 *(b)*, and that as a result, the Court should not only rule on the latter breach, but also on the violation of paragraph 1 *(a)* and *(c)*. Germany further asserts "that 'application of the Convention' in the sense of the Optional Protocol very well encompasses the consequences of a violation of individual rights under the Convention, including the espousal of respective claims by the State of nationality".

42. The Court cannot accept the United States objections. The dispute between the Parties as to whether Article 36, paragraph 1 *(a)* and *(c)*, of the Vienna Convention have been violated in this case in consequence of the breach of paragraph 1 *(b)* does relate to the interpretation and appli-

cation of the Convention. This is also true of the dispute as to whether paragraph 1 *(b)* creates individual rights and whether Germany has standing to assert those rights on behalf of its nationals. These are consequently disputes within the meaning of Article I of the Optional Protocol. Moreover, the Court cannot accept the contention of the United States that Germany's claim based on the individual rights of the LaGrand brothers is beyond the Court's jurisdiction because diplomatic protection is a concept of customary international law. This fact does not prevent a State party to a treaty, which creates individual rights, from taking up the case of one of its nationals and instituting international judicial proceedings on behalf of that national, on the basis of a general jurisdictional clause in such a treaty. Therefore the Court concludes that it has jurisdiction with respect to the whole of Germany's first submission.

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43. The United States does not challenge the Court's jurisdiction in regard to Germany's second submission. Nor does it as such address the issue of the jurisdiction of the Court over the third submission concerning the binding nature of the Order of the Court of 3 March 1999 indicating provisional measures. It argues, however, that this submission is inadmissible (see paragraphs 50 and 53-55 below), and that the Court can fully and adequately dispose of the merits of this case without having to rule on the submission.

44. Germany asserts that the Court's Order of 3 March 1999 was intended to "enforce" the rights enjoyed by Germany under the Vienna Convention and "preserve those rights pending its decision on the merits". Germany claims that a dispute as to "whether the United States were obliged to comply and did comply with the Order" necessarily arises out of the interpretation or application of the Convention and thus falls within the jurisdiction of the Court. Germany argues further that questions "relating to the non-compliance with a decision of the Court under Article 41, para. 1, of the Statute, e.g. Provisional Measures, are an integral component of the entire original dispute between the parties". Moreover, Germany contends that its third submission also implicates "in an auxiliary and subsidiary manner . . . the inherent jurisdiction of the Court for claims as closely interrelated with each other as the ones before the Court in the present case".

45. The third submission of Germany concerns issues that arise directly out of the dispute between the Parties before the Court over which the Court has already held that it has jurisdiction (see paragraph 42 above), and which are thus covered by Article I of the Optional Protocol. The Court reaffirms, in this connection, what it said in its Judgment in the

Fisheries Jurisdiction case, where it declared that in order to consider the dispute in all its aspects it may also deal with a submission that "is one based on facts subsequent to the filing of the Application, but arising directly out of the question which is the subject-matter of that Application. As such it falls within the scope of the Court's jurisdiction . . ." (*Fisheries Jurisdiction (Federal Republic of Germany* v. *Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 203, para. 72). Where the Court has jurisdiction to decide a case, it also has jurisdiction to deal with submissions requesting it to determine that an order indicating measures which seeks to preserve the rights of the Parties to this dispute has not been complied with.

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46. The United States objects to the jurisdiction of the Court over the fourth submission in so far as it concerns a request for assurances and guarantees of non-repetition. The United States submits that its "jurisdictional argument [does] not apply to jurisdiction to order cessation of a breach or to order reparation, but is limited to the question of assurances and guarantees . . . [which] are conceptually distinct from reparation". It contends that Germany's fourth submission

> "goes beyond any remedy that the Court can or should grant, and should be rejected. The Court's power to decide cases . . . does not extend to the power to order a State to provide any 'guarantee' intended to confer additional legal rights on the Applicant State . . . The United States does not believe that it can be the role of the Court . . . to impose any obligations that are additional to or that differ in character from those to which the United States consented when it ratified the Vienna Convention."

47. Germany counters this argument by asserting that

> "a dispute whether or not the violation of a provision of the Vienna Convention gives rise to a certain remedy is a dispute concerning 'the application and interpretation' of the aforesaid Convention, and thus falls within the scope of Art. I of the Optional Protocol".

Germany notes in this regard that the Court, in its Order of 9 April 1998 in the case concerning the *Vienna Convention on Consular Relations (Paraguay* v. *United States of America)*, held that

> "there exists a dispute as to whether the relief sought by Paraguay is a remedy available under the Vienna Convention, in particular in relation to Articles 5 and 36 thereof; and . . . this is a dispute arising out of the application of the Convention within the meaning of Article I of the Optional Protocol concerning the Compulsory Settlement of Disputes of 24 April 1963" (*I.C.J. Reports 1998*, p. 256, para. 31).

Germany asserts also that its fourth submission arises under principles of State responsibility, according to which Germany is entitled to a "whole range of remedies" as a consequence of the particular violations alleged in this case and that these questions of State responsibility "are clearly within the ambit of the Optional Protocol".

48. The Court considers that a dispute regarding the appropriate remedies for the violation of the Convention alleged by Germany is a dispute that arises out of the interpretation or application of the Convention and thus is within the Court's jurisdiction. Where jurisdiction exists over a dispute on a particular matter, no separate basis for jurisdiction is required by the Court to consider the remedies a party has requested for the breach of the obligation (*Factory at Chorzów, P.C.I.J., Series A, No. 9*, p. 22). Consequently, the Court has jurisdiction in the present case with respect to the fourth submission of Germany.

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49. The United States has argued that the submissions of Germany are inadmissible on various grounds. The Court will consider these objections in the order presented by the United States.

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50. The United States objects first to Germany's second, third and fourth submissions. According to the United States, these submissions are inadmissible because Germany seeks to have this Court "play the role of ultimate court of appeal in national criminal proceedings", a role which it is not empowered to perform. The United States maintains that many of Germany's arguments, in particular those regarding the rule of "procedural default", ask the Court "to address and correct . . . asserted violations of US law and errors of judgment by US judges" in criminal proceedings in national courts.

51. Germany denies that it requests the Court to act as an appellate criminal court, or that Germany's requests are in any way aimed at interfering with the administration of justice within the United States judicial system. It maintains that it is merely asking the Court to adjudge and declare that the conduct of the United States was inconsistent with its international legal obligations towards Germany under the Vienna Convention, and to draw from this failure certain legal consequences provided for in the international law of State responsibility.

52. The Court does not agree with these arguments of the United

States concerning the admissibility of the second, third and fourth German submissions. In the second submission, Germany asks the Court to interpret the scope of Article 36, paragraph 2, of the Vienna Convention; the third submission seeks a finding that the United States violated an Order issued by this Court pursuant to Article 41 of its Statute; and in Germany's fourth submission, the Court is asked to determine the applicable remedies for the alleged violations of the Convention. Although Germany deals extensively with the practice of American courts as it bears on the application of the Convention, all three submissions seek to require the Court to do no more than apply the relevant rules of international law to the issues in dispute between the Parties to this case. The exercise of this function, expressly mandated by Article 38 of its Statute, does not convert this Court into a court of appeal of national criminal proceedings.

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53. The United States also argues that Germany's third submission is inadmissible because of the manner in which these proceedings were brought before the Court by Germany. It notes that German consular officials became aware of the LaGrands' cases in 1992, but that the German Government did not express concern or protest to the United States authorities for some six and a half years. It maintains that the issue of the absence of consular notification was not raised by Germany until 22 February 1999, two days before the date scheduled for Karl LaGrand's execution, in a letter from the German Foreign Minister to the Secretary of State of the United States (see paragraph 26 above). Germany then filed the Application instituting these proceedings, together with a request for provisional measures, after normal business hours in the Registry in the evening of 2 March 1999, some 27 hours before the execution of Walter LaGrand (see paragraph 30 above).

54. The United States rejects the contention that Germany found out only seven days before the filing of its Application that the authorities of Arizona knew as early as 1982 that the LaGrands were German nationals; according to the United States, their German nationality was referred to in pre-sentence reports prepared in 1984, which should have been familiar to German consular officers much earlier than 1999, given Germany's claims regarding the vigour and effectiveness of its consular assistance.

55. According to the United States, Germany's late filing compelled the Court to respond to its request for provisional measures by acting *ex parte*, without full information. The United States claims that the procedure followed was inconsistent with the principles of "equality of the

Parties" and of giving each Party a sufficient opportunity to be heard, and that this would justify the Court in not addressing Germany's third submission which is predicated wholly upon the Order of 3 March 1999.

56. Germany acknowledges that delay on the part of a claimant State may render an application inadmissible, but maintains that international law does not lay down any specific time-limit in that regard. It contends that it was only seven days before it filed its Application that it became aware of all the relevant facts underlying its claim, in particular, the fact that the authorities of Arizona knew of the German nationality of the LaGrands since 1982. According to Germany, it cannot be accused of negligence in failing to obtain the 1984 pre-sentence reports earlier. It also maintains that in the period between 1992, when it learned of the LaGrands' cases, and the filing of its Application, it engaged in a variety of activities at the diplomatic and consular level. It adds that it had been confident for much of this period that the United States would ultimately rectify the violations of international law involved.

57. The Court recognizes that Germany may be criticized for the manner in which these proceedings were filed and for their timing. The Court recalls, however, that notwithstanding its awareness of the consequences of Germany's filing at such a late date it nevertheless considered it appropriate to enter the Order of 3 March 1999, given that an irreparable prejudice appeared to be imminent. In view of these considerations, the Court considers that Germany is now entitled to challenge the alleged failure of the United States to comply with the Order. Accordingly, the Court finds that Germany's third submission is admissible.

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58. The United States argues further that Germany's first submission, as far as it concerns its right to exercise diplomatic protection with respect to its nationals, is inadmissible on the ground that the LaGrands did not exhaust local remedies. The United States maintains that the alleged breach concerned the duty to inform the LaGrands of their right to consular access, and that such a breach could have been remedied at the trial stage, provided it was raised in a timely fashion. The United States contends that when a person fails, for example, to sue in a national court before a statute of limitations has expired, the claim is both procedurally barred in national courts and inadmissible in international tribunals for failure to exhaust local remedies. It adds that the failure of counsel for the LaGrands to raise the breach of the Vienna Convention at the appropriate stage and time of the proceedings does not excuse the non-exhaustion of local remedies. According to the United States, this

failure of counsel is imputable to their clients because the law treats defendants and their lawyers as a single entity in terms of their legal positions. Moreover, the State is not accountable for the errors or mistaken strategy by lawyers.

59. Germany responds that international law requires the exhaustion of only those remedies which are legally and practically available. Germany claims that in this case there was no remedy which the LaGrands failed to invoke that would have been available in the specific context of their case. This is so because, prior to 1992, the LaGrands could not resort to the available remedies, since they were unaware of their rights due to failure of the United States authorities to comply with the requirements of the Vienna Convention; thereafter, the "procedural default" rule prevented them from seeking any remedy.

60. The Court notes that it is not disputed that the LaGrands sought to plead the Vienna Convention in United States courts after they learned in 1992 of their rights under the Convention; it is also not disputed that by that date the procedural default rule barred the LaGrands from obtaining any remedy in respect of the violation of those rights. Counsel assigned to the LaGrands failed to raise this point earlier in a timely fashion. However, the United States may not now rely before this Court on this fact in order to preclude the admissibility of Germany's first submission, as it was the United States itself which had failed to carry our its obligation under the Convention to inform the LaGrand brothers.

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61. The United States also contends that Germany's submissions are inadmissible on the ground that Germany seeks to have a standard applied to the United States that is different from its own practice. According to the United States, Germany has not shown that its system of criminal justice requires the annulment of criminal convictions where there has been a breach of the duty of consular notification; and that the practice of Germany in similar cases has been to do no more than offer an apology. The United States maintains that it would be contrary to basic principles of administration of justice and equality of the Parties to apply against the United States alleged rules that Germany appears not to accept for itself.

62. Germany denies that it is asking the United States to adhere to standards which Germany itself does not abide by; it maintains that its law and practice is fully in compliance with the standards which it invokes. In this regard, it explains that the German Code of Criminal

Procedure provides a ground of appeal where a legal norm, including a norm of international law, is not applied or incorrectly applied and where there is a possibility that the decision was impaired by this fact.

63. The Court need not decide whether this argument of the United States, if true, would result in the inadmissibility of Germany's submissions. Here the evidence adduced by the United States does not justify the conclusion that Germany's own practice fails to conform to the standards it demands from the United States in this litigation. The United States relies on certain German cases to demonstrate that Germany has itself proffered only an apology for violating Article 36 of the Vienna Convention, and that State practice shows that this is the appropriate remedy for such a violation. But the cases concerned entailed relatively light criminal penalties and are not evidence as to German practice where an arrested person, who has not been informed without delay of his or her rights, is facing a severe penalty as in the present case. It is no doubt the case, as the United States points out, that Article 36 of the Vienna Convention imposes identical obligations on States, irrespective of the gravity of the offence a person may be charged with and of the penalties that may be imposed. However, it does not follow therefrom that the remedies for a violation of this Article must be identical in all situations. While an apology may be an appropriate remedy in some cases, it may in others be insufficient. The Court accordingly finds that this claim of inadmissibility must be rejected.

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64. Having determined that the Court has jurisdiction, and that the submissions of Germany are admissible, the Court now turns to the merits of each of these four submissions.

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65. Germany's first submission requests the Court to adjudge and declare:

> "that the United States, by not informing Karl and Walter LaGrand without delay following their arrest of their rights under Article 36 subparagraph 1 *(b)* of the Vienna Convention on Consular Relations, and by depriving Germany of the possibility of rendering consular assistance, which ultimately resulted in the execution of Karl and Walter LaGrand, violated its international legal obligations to Germany, in its own right and in its right of diplomatic protection of its nationals, under Articles 5 and 36 paragraph 1 of the said Convention".

66. Germany claims that the United States violated its obligation under Article 36, paragraph 1 *(b)*, to "inform a national of the sending State without delay of his or her right to inform the consular post of his home State of his arrest or detention". Specifically, Germany maintains that the United States violated its international legal obligation to Germany under Article 36, paragraph 1 *(b)*, by failing to inform the German nationals Karl and Walter LaGrand "without delay" of their rights under that subparagraph.

67. The United States acknowledges, and does not contest Germany's basic claim, that there was a breach of its obligation under Article 36, paragraph 1 *(b)*, of the Convention "promptly to inform the LaGrand brothers that they could ask that a German consular post be notified of their arrest and detention".

68. Germany also claims that the violation by the United States of Article 36, paragraph 1 *(b)*, led to consequential violations of Article 36, paragraph 1 *(a)* and *(c)*. It points out that, when the obligation to inform the arrested person without delay of his or her right to contact the consulate is disregarded, "the other rights contained in Article 36, paragraph 1, become in practice irrelevant, indeed meaningless". Germany maintains that, "[b]y informing the LaGrand brothers of their right to inform the consulate more than 16 years after their arrest, the United States . . . clearly failed to meet the standard of Article 36 [(1) *(c)*]". It concludes that, by not preventing the execution of Karl and Walter LaGrand, and by "making irreversible its earlier breaches of Art. 5 and 36 (1) and (2) and causing irreparable harm, the United States violated its obligations under international law".

69. The United States argues that the underlying conduct complained of by Germany is one and the same, namely, the failure to inform the LaGrand brothers as required by Article 36, paragraph 1 *(b)*. Therefore, it disputes any other basis for Germany's claims that other provisions, such as subparagraphs *(a)* and *(c)* of Article 36, paragraph 1, of the Convention, were also violated. The United States asserts that Germany's claims regarding Article 36, paragraph 1 *(a)* and *(c)*, are "particularly misplaced" in that the LaGrands were able to and did communicate freely with consular officials after 1992. There was, in the view of the United States, "no deprivation of Germany's right to provide consular assistance, under Article 5 or Article 36, to Karl or Walter LaGrand" and "Germany's attempt to transform a breach of one obligation into an additional breach of a wholly separate and distinct obligation should be rejected by the Court."

70. In response, Germany asserts that it is "commonplace that one

and the same conduct may result in several violations of distinct obligations". Hence, when a detainee's right to notification without delay is violated, he or she cannot establish contact with the consulate, receive visits from consular officers, nor be supported by adequate counsel. "Therefore, violation of this right is bound to imply violation of the other rights . . . [and] later observance of the rights of Article 36, paragraph 1 *(a)* and *(c)*, could not remedy the previous violation of those provisions."

71. Germany further contends that there is a causal relationship between the breach of Article 36 and the ultimate execution of the LaGrand brothers. Germany's inability to render prompt assistance was, in its view, a "direct result of the United States' breach of its Vienna Convention obligations". It is claimed that, had Germany been properly afforded its rights under the Vienna Convention, it would have been able to intervene in time and present a "persuasive mitigation case" which "likely would have saved" the lives of the brothers. Germany believes that, "[h]ad proper notification been given under the Vienna Convention, competent trial counsel certainly would have looked to Germany for assistance in developing this line of mitigating evidence". Moreover, Germany argues that, due to the doctrine of procedural default and the high post-conviction threshold for proving ineffective counsel under United States law, Germany's intervention at a stage later than the trial phase could not "remedy the extreme prejudice created by the counsel appointed to represent the LaGrands".

72. The United States terms these arguments as "suppositions about what might have occurred had the LaGrand brothers been properly informed of the possibility of consular notification". It calls into question Germany's assumption that German consular officials from Los Angeles would rapidly have given extensive assistance to the LaGrands' defence counsel before the 1984 sentencing, and contests that such consular assistance would have affected the outcome of the sentencing proceedings. According to the United States, these arguments "rest on speculation" and do not withstand analysis. Finally, the United States finds it extremely doubtful that the early childhood "mitigating evidence" mentioned by Germany, if introduced at the trial, would have persuaded the sentencing judge to be lenient, as the brothers' subsequent 17 years of experiences in the United States would have been given at least equal weight. The United States points out, moreover, that such evidence was in fact presented at trial.

73. The Court will first examine the submission Germany advances in its own right. The Court observes, in this connection, that the United States does not deny that it violated paragraph 1 *(b)* in relation to Ger-

many. The Court also notes that as a result of this breach, Germany did not learn until 1992 of the detention, trial and sentencing of the LaGrand brothers. The Court concludes therefrom that on the facts of this case, the breach of the United States had the consequence of depriving Germany of the exercise of the rights accorded it under Article 36, paragraph 1 *(a)* and paragraph 1 *(c)*, and thus violated these provisions of the Convention. Although the violation of paragraph 1 *(b)* of Article 36 will not necessarily always result in the breach of the other provisions of this Article, the Court finds that the circumstances of this case compel the opposite conclusion, for the reasons indicated below. In view of this finding, it is not necessary for the Court to deal with Germany's further claim under Article 5 of the Convention.

74. Article 36, paragraph 1, establishes an interrelated régime designed to facilitate the implementation of the system of consular protection. It begins with the basic principle governing consular protection: the right of communication and access (Art. 36, para. 1 *(a)*). This clause is followed by the provision which spells out the modalities of consular notification (Art. 36, para. 1 *(b)*). Finally Article 36, paragraph 1 *(c)*, sets out the measures consular officers may take in rendering consular assistance to their nationals in the custody of the receiving State. It follows that when the sending State is unaware of the detention of its nationals due to the failure of the receiving State to provide the requisite consular notification without delay, which was true in the present case during the period between 1982 and 1992, the sending State has been prevented for all practical purposes from exercising its rights under Article 36, paragraph 1. It is immaterial for the purposes of the present case whether the LaGrands would have sought consular assistance from Germany, whether Germany would have rendered such assistance, or whether a different verdict would have been rendered. It is sufficient that the Convention conferred these rights, and that Germany and the LaGrands were in effect prevented by the breach of the United States from exercising them, had they so chosen.

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75. Germany further contends that "the breach of Article 36 by the United States did not only infringe upon the rights of Germany as a State party to the [Vienna] Convention but also entailed a violation of the individual rights of the LaGrand brothers". Invoking its right of diplomatic protection, Germany also seeks relief against the United States on this ground.

Germany maintains that the right to be informed of the rights under Article 36, paragraph 1 *(b)*, of the Vienna Convention, is an individual right of every national of a State party to the Convention who enters the

territory of another State party. It submits that this view is supported by the ordinary meaning of the terms of Article 36, paragraph 1 *(b)*, of the Vienna Convention, since the last sentence of that provision speaks of the "rights" under this subparagraph of "the person concerned", i.e., of the foreign national arrested or detained. Germany adds that the provision in Article 36, paragraph 1 *(b)*, according to which it is for the arrested person to decide whether consular notification is to be provided, has the effect of conferring an individual right upon the foreign national concerned. In its view, the context of Article 36 supports this conclusion since it relates to both the concerns of the sending and receiving States and to those of individuals. According to Germany, the *travaux préparatoires* of the Vienna Convention lend further support to this interpretation. In addition, Germany submits that the "United Nations Declaration on the human rights of individuals who are not nationals of the country in which they live", adopted by General Assembly resolution 40/144 on 13 December 1985, confirms the view that the right of access to the consulate of the home State, as well as the information on this right, constitute individual rights of foreign nationals and are to be regarded as human rights of aliens.

76. The United States questions what this additional claim of diplomatic protection contributes to the case and argues that there are no parallels between the present case and cases of diplomatic protection involving the espousal by a State of economic claims of its nationals. The United States maintains that the right of a State to provide consular assistance to nationals detained in another country, and the right of a State to espouse the claims of its nationals through diplomatic protection, are legally different concepts.

The United States contends, furthermore, that rights of consular notification and access under the Vienna Convention are rights of States, and not of individuals, even though these rights may benefit individuals by permitting States to offer them consular assistance. It maintains that the treatment due to individuals under the Convention is inextricably linked to and derived from the right of the State, acting through its consular officer, to communicate with its nationals, and does not constitute a fundamental right or a human right. The United States argues that the fact that Article 36 by its terms recognizes the rights of individuals does not determine the nature of those rights or the remedies required under the Vienna Convention for breaches of that Article. It points out that Article 36 begins with the words "[w]ith a view to facilitating the exercise of consular functions relating to nationals of the sending State", and that this wording gives no support to the notion that the rights and obligations enumerated in paragraph 1 of that Article are intended to ensure that nationals of the sending State have any particular rights or

treatment in the context of a criminal prosecution. The *travaux préparatoires* of the Vienna Convention according to the United States do not reflect a consensus that Article 36 was addressing immutable individual rights, as opposed to individual rights derivative of the rights of States.

77. The Court notes that Article 36, paragraph 1 *(b)*, spells out the obligations the receiving State has towards the detained person and the sending State. It provides that, at the request of the detained person, the receiving State must inform the consular post of the sending State of the individual's detention "without delay". It provides further that any communication by the detained person addressed to the consular post of the sending State must be forwarded to it by authorities of the receiving State "without delay". Significantly, this subparagraph ends with the following language: "The said authorities shall inform the person concerned without delay of *his rights* under this subparagraph" (emphasis added). Moreover, under Article 36, paragraph 1 *(c)*, the sending State's right to provide consular assistance to the detained person may not be exercised "if he expressly opposes such action". The clarity of these provisions, viewed in their context, admits of no doubt. It follows, as has been held on a number of occasions, that the Court must apply these as they stand (see *Acquisition of Polish Nationality, Advisory Opinion, 1923, P.C.I.J., Series B, No. 7*, p. 20; *Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, I.C.J. Reports 1950*, p. 8; *Arbitral Award of 31 July 1989, Judgment, I.C.J. Reports 1991*, pp. 69-70, para. 48; *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, p. 25, para. 51). Based on the text of these provisions, the Court concludes that Article 36, paragraph 1, creates individual rights, which, by virtue of Article I of the Optional Protocol, may be invoked in this Court by the national State of the detained person. These rights were violated in the present case.

78. At the hearings, Germany further contended that the right of the individual to be informed without delay under Article 36, paragraph 1, of the Vienna Convention was not only an individual right but has today assumed the character of a human right. In consequence, Germany added, "the character of the right under Article 36 as a human right renders the effectiveness of this provision even more imperative". The Court having found that the United States violated the rights accorded by Article 36, paragraph 1, to the LaGrand brothers, it does not appear necessary to it to consider the additional argument developed by Germany in this regard.

* *

79. The Court will now consider Germany's second submission, in which it asks the Court to adjudge and declare:

> "that the United States, by applying rules of its domestic law, in particular the doctrine of procedural default, which barred Karl and Walter LaGrand from raising their claims under the Vienna Convention on Consular Relations, and by ultimately executing them, violated its international legal obligation to Germany under Article 36 paragraph 2 of the Vienna Convention to give full effect to the purposes for which the rights accorded under Article 36 of the said Convention are intended".

80. Germany argues that, under Article 36, paragraph 2, of the Vienna Convention

> "the United States is under an obligation to ensure that its municipal 'laws and regulations . . . enable full effect to be given to the purposes for which the rights accorded under this article are intended' [and that it] is in breach of this obligation by upholding rules of domestic law which make it impossible to successfully raise a violation of the right to consular notification in proceedings subsequent to a conviction of a defendant by a jury".

81. Germany points out that the "procedural default" rule is among the rules of United States domestic law whose application make it impossible to invoke a breach of the notification requirement. According to Germany, this rule "is closely connected with the division of labour between federal and state jurisdiction in the United States . . . [where] [c]riminal jurisdiction belongs to the states except in cases provided for in the Constitution". This rule, Germany explains, requires "exhaustion of remedies at the state level before a *habeas corpus* motion can be filed with federal Courts".

Germany emphasizes that it is not the "procedural default" rule as such that is at issue in the present proceedings, but the manner in which it was applied in that it "deprived the brothers of the possibility to raise the violations of their right to consular notification in US criminal proceedings".

82. Furthermore, having examined the relevant United States jurisprudence, Germany contends that the procedural default rule had "made it impossible for the LaGrand brothers to effectively raise the issue of the lack of consular notification after they had at last learned of their rights and established contact with the German consulate in Los Angeles in 1992".

83. Finally, Germany states that it seeks

> "[n]othing . . . more than compliance, or, at least, a system in place which does not automatically reproduce violation after violation of the Vienna Convention, only interrupted by the apologies of the United States Government".

84. The United States objects to Germany's second submission, since it considers that "Germany's position goes far beyond the wording of the Convention, the intentions of the parties when it was negotiated, and the practice of States, including Germany's practice".

85. In the view of the United States:

> "[t]he Vienna Convention does not require States Party to create a national law remedy permitting individuals to assert claims involving the Convention in criminal proceedings. If there is no such requirement, it cannot violate the Convention to require that efforts to assert such claims be presented to the first court capable of adjudicating them".

According to the United States,

> "[i]f there is no obligation under the Convention to create such individual remedies in criminal proceedings, the rule of procedural default — requiring that claims seeking such remedies be asserted at an appropriately early stage — cannot violate the Convention".

86. The United States believes that Article 36, paragraph 2, "has a very clear meaning" and

> "means, as it says, that the rights referred to in paragraph 1 shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso that said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under the Article are intended".

In the view of the United States,

> "[i]n the context of a foreign national in detention, the relevant laws and regulations contemplated by Article 36 (2) are those that may affect the exercise of specific rights under Article 36 (1), such as those addressing the timing of communications, visiting hours, and security in a detention facility. There is no suggestion in the text of Article 36 (2) that the rules of criminal law and procedure under which a defendant would be tried or have his conviction and sentence reviewed by appellate courts are also within the scope of this provision."

87. The United States concludes that Germany's second submission must be rejected "because it is premised on a misinterpretation of Article 36, paragraph 2, which reads the context of the provision — the exercise of a right under paragraph 1 — out of existence".

88. Article 36, paragraph 2, of the Vienna Convention reads as follows:

> "The rights referred to in paragraph 1 of this article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this article are intended."

89. The Court cannot accept the argument of the United States which proceeds, in part, on the assumption that paragraph 2 of Article 36 applies only to the rights of the sending State and not also to those of the detained individual. The Court has already determined that Article 36, paragraph 1, creates individual rights for the detained person in addition to the rights accorded the sending State, and that consequently the reference to "rights" in paragraph 2 must be read as applying not only to the rights of the sending State, but also to the rights of the detained individual (see paragraph 77 above).

90. Turning now to the "procedural default" rule, the application of which in the present case Germany alleges violated Article 36, paragraph 2, the Court emphasizes that a distinction must be drawn between that rule as such and its specific application in the present case. In itself, the rule does not violate Article 36 of the Vienna Convention. The problem arises when the procedural default rule does not allow the detained individual to challenge a conviction and sentence by claiming, in reliance on Article 36, paragraph 1, of the Convention, that the competent national authorities failed to comply with their obligation to provide the requisite consular information "without delay", thus preventing the person from seeking and obtaining consular assistance from the sending State.

91. In this case, Germany had the right at the request of the LaGrands "to arrange for [their] legal representation" and was eventually able to provide some assistance to that effect. By that time, however, because of the failure of the American authorities to comply with their obligation under Article 36, paragraph 1 *(b)*, the procedural default rule prevented counsel for the LaGrands to effectively challenge their convictions and sentences other than on United States constitutional grounds. As a result, although United States courts could and did examine the professional competence of counsel assigned to the indigent LaGrands by reference to United States constitutional standards, the procedural default rule prevented them from attaching any legal significance to the fact, *inter alia*, that the violation of the rights set forth in Article 36, paragraph 1, prevented Germany, in a timely fashion, from retaining private counsel for

them and otherwise assisting in their defence as provided for by the Convention. Under these circumstances, the procedural default rule had the effect of preventing "full effect [from being] given to the purposes for which the rights accorded under this article are intended", and thus violated paragraph 2 of Article 36.

* *

92. The Court will now consider Germany's third submission, in which it asks the Court to adjudge and declare:

> "that the United States, by failing to take all measures at its disposal to ensure that Walter LaGrand was not executed pending the final decision of the International Court of Justice on the matter, violated its international legal obligation to comply with the Order on provisional measures issued by the Court on 3 March 1999, and to refrain from any action which might interfere with the subject matter of a dispute while judicial proceedings are pending".

93. In its Memorial, Germany contended that "[p]rovisional [m]easures indicated by the International Court of Justice [were] binding by virtue of the law of the United Nations Charter and the Statute of the Court". In support of its position, Germany developed a number of arguments in which it referred to the "principle of effectiveness", to the "procedural prerequisites" for the adoption of provisional measures, to the binding nature of provisional measures as a "necessary consequence of the bindingness of the final decision", to "Article 94 (1), of the United Nations Charter", to "Article 41 (1), of the Statute of the Court" and to the "practice of the Court".

Referring to the duty of the "parties to a dispute before the Court . . . to preserve its subject-matter", Germany added that:

> "[a]part from having violated its duties under Art. 94 (1) of the United Nations Charter and Art. 41 (1) of the Statute, the United States has also violated the obligation to refrain from any action which might interfere with the subject-matter of a dispute while judicial proceedings are pending".

At the hearings, Germany further stated the following:

> "A judgment by the Court on jurisdiction or merits cannot be treated on exactly the same footing as a provisional measure . . . Article 59 and Article 60 [of the Statute] do not apply to provisional measures or, to be more exact, apply to them only by implication; that is to say, to the extent that such measures, being both incidental

and provisional, contribute to the exercise of a judicial function whose end-result is, by definition, the delivery of a judicial decision. There is here an inherent logic in the judicial procedure, and to disregard it would be tantamount, as far as the Parties are concerned, to deviating from the principle of good faith and from what the German pleadings call 'the principle of institutional effectiveness' . . . [P]rovisional measures . . . are indeed legal decisions, but they are decisions of procedure . . . Since their decisional nature is, however, implied by the logic of urgency and by the need to safeguard the effectiveness of the proceedings, they accordingly create genuine legal obligations on the part of those to whom they are addressed."

94. Germany claims that the United States committed a threefold violation of the Court's Order of 3 March 1999:

"(1) Immediately after the International Court of Justice had rendered its Order on Provisional Measures, Germany appealed to the US Supreme Court in order to reach a stay of the execution of Walter LaGrand, in accordance with the International Court's Order to the same effect. In the course of these proceedings — and in full knowledge of the Order of the International Court — the Office of the Solicitor General, a section of the US Department of Justice — in a letter to the Supreme Court argued once again that: 'an order of the International Court of Justice indicating provisional measures is not binding and does not furnish a basis for judicial relief'.

This statement of a high-ranking official of the Federal Government . . . had a direct influence on the decision of the Supreme Court.

. . . . . .

(2) In the following, the US Supreme Court — an agency of the United States — refused by a majority vote to order that the execution be stayed. In doing so, it rejected the German arguments based essentially on the Order of the International Court of Justice on Provisional Measures . . .

(3) Finally, the Governor of Arizona did not order a stay of the execution of Walter LaGrand although she was vested with the right to do so by the laws of the State of Arizona. Moreover, in the present case, the Arizona Executive Board of Clemency — for the first time in the history of this institution — had issued a recommendation for a temporary stay, not least in light of the international legal issues involved in the case . . ."

95. The United States argues that it "did what was called for by the Court's 3 March Order, given the extraordinary and unprecedented cir-

cumstances in which it was forced to act". It points out in this connection that the United States Government "immediately transmitt[ed] the Order to the Governor of Arizona", that "the United States placed the Order in the hands of the one official who, at that stage, might have had legal authority to stop the execution" and that by a letter from the Legal Counsellor of the United States Embassy in The Hague dated 8 March 1999, it informed the International Court of Justice of all the measures which had been taken in implementation of the Order.

The United States further states that:

> "[t]wo central factors constrained the United States ability to act. The first was the extraordinarily short time between issuance of the Court's Order and the time set for the execution of Walter LaGrand . . .
>
> . . . . . .
>
> The second constraining factor was the character of the United States of America as a federal republic of divided powers."

96. The United States also alleges that the "terms of the Court's 3 March Order did not create legal obligations binding on [it]". It argues in this respect that "[t]he language used by the Court in the key portions of its Order is not the language used to create binding legal obligations" and that

> "the Court does not need here to decide the difficult and controversial legal question of whether its orders indicating provisional measures would be capable of creating international legal obligations if worded in mandatory . . . terms".

It nevertheless maintains that those orders cannot have such effects and, in support of that view, develops arguments concerning "the language and history of Article 41 (1) of the Court's Statute and Article 94 of the Charter of the United Nations", the "Court's and State practice under these provisions", and the "weight of publicists' commentary".

Concerning Germany's argument based on the "principle of effectiveness", the United States contends that

> "[i]n an arena where the concerns and sensitivities of States, and not abstract logic, have informed the drafting of the Court's constitutive documents, it is perfectly understandable that the Court might have the power to issue binding final judgments, but a more circumscribed authority with respect to provisional measures".

Referring to Germany's argument that the United States "violated the obligation to refrain from any action which might interfere with the sub-

ject matter of a dispute while judicial proceedings are pending", the United States further asserts that:

> "The implications of the rule as presented by Germany are potentially quite dramatic, however. Germany appears to contend that by merely filing a case with the Court, an Applicant can force a Respondent to refrain from continuing any action that the Applicant deems to affect the subject of the dispute. If the law were as Germany contends, the entirety of the Court's rules and practices relating to provisional measures would be surplussage. This is not the law, and this is not how States or this Court have acted in practice."

97. Lastly, the United States states that in any case, "[b]ecause of the press of time stemming from Germany's last-minute filing of the case, basic principles fundamental to the judicial process were not observed in connection with the Court's 3 March Order" and that

> "[t]hus, whatever one might conclude regarding a general rule for provisional measures, it would be anomalous — to say the least — for the Court to construe this Order as a source of binding legal obligations".

98. Neither the Permanent Court of International Justice, nor the present Court to date, has been called upon to determine the legal effects of orders made under Article 41 of the Statute. As Germany's third submission refers expressly to an international legal obligation "to comply with the Order on Provisional Measures issued by the Court on 3 March 1999", and as the United States disputes the existence of such an obligation, the Court is now called upon to rule expressly on this question.

99. The dispute which exists between the Parties with regard to this point essentially concerns the interpretation of Article 41, which is worded in identical terms in the Statute of each Court (apart from the respective references to the Council of the League of Nations and the Security Council). This interpretation has been the subject of extensive controversy in the literature. The Court will therefore now proceed to the interpretation of Article 41 of the Statute. It will do so in accordance with customary international law, reflected in Article 31 of the 1969 Vienna Convention on the Law of Treaties. According to paragraph 1 of Article 31, a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of the treaty's object and purpose.

100. The French text of Article 41 reads as follows:

> "1. La Cour a le pouvoir d'*indiquer*, si elle estime que les circons-

tances l'exigent, quelles mesures conservatoires du droit de chacun *doivent* être prises à titre provisoire.

2. En attendant l'arrêt définitif, l'*indication* de ces mesures est immédiatement notifiée aux parties et au Conseil de sécurité." (Emphasis added.)

In this text, the terms "indiquer" and "l'indication" may be deemed to be neutral as to the mandatory character of the measure concerned; by contrast the words "doivent être prises" have an imperative character.

For its part, the English version of Article 41 reads as follows:

"1. The Court shall have the power to *indicate*, if it considers that circumstances so require, any provisional measures which *ought* to be taken to preserve the respective rights of either party.

2. Pending the final decision, notice of the measures *suggested* shall forthwith be given to the parties and to the Security Council." (Emphasis added.)

According to the United States, the use in the English version of "indicate" instead of "order", of "ought" instead of "must" or "shall", and of "suggested" instead of "ordered", is to be understood as implying that decisions under Article 41 lack mandatory effect. It might however be argued, having regard to the fact that in 1920 the French text was the original version, that such terms as "indicate" and "ought" have a meaning equivalent to "order" and "must" or "shall".

101. Finding itself faced with two texts which are not in total harmony, the Court will first of all note that according to Article 92 of the Charter, the Statute "forms an integral part of the present Charter". Under Article 111 of the Charter, the French and English texts of the latter are "equally authentic". The same is equally true of the Statute.

In cases of divergence between the equally authentic versions of the Statute, neither it nor the Charter indicates how to proceed. In the absence of agreement between the parties in this respect, it is appropriate to refer to paragraph 4 of Article 33 of the Vienna Convention on the Law of Treaties, which in the view of the Court again reflects customary international law. This provision reads "when a comparison of the authentic texts discloses a difference of meaning which the application of Articles 31 and 32 does not remove the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted".

The Court will therefore now consider the object and purpose of the Statute together with the context of Article 41.

102. The object and purpose of the Statute is to enable the Court to fulfil the functions provided for therein, and, in particular, the basic function of judicial settlement of international disputes by binding decisions in accordance with Article 59 of the Statute. The context in which Article 41 has to be seen within the Statute is to prevent the Court from

being hampered in the exercise of its functions because the respective rights of the parties to a dispute before the Court are not preserved. It follows from the object and purpose of the Statute, as well as from the terms of Article 41 when read in their context, that the power to indicate provisional measures entails that such measures should be binding, inasmuch as the power in question is based on the necessity, when the circumstances call for it, to safeguard, and to avoid prejudice to, the rights of the parties as determined by the final judgment of the Court. The contention that provisional measures indicated under Article 41 might not be binding would be contrary to the object and purpose of that Article.

103. A related reason which points to the binding character of orders made under Article 41 and to which the Court attaches importance is the existence of a principle which has already been recognized by the Permanent Court of International Justice when it spoke of

> "the principle universally accepted by international tribunals and likewise laid down in many conventions . . . to the effect that the parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given, and, in general, not allow any step of any kind to be taken which might aggravate or extend the dispute" (*Electricity Company of Sofia and Bulgaria, Order of 5 December 1939, P.C.I.J, Series A/B, No. 79*, p. 199).

Furthermore measures designed to avoid aggravating or extending disputes have frequently been indicated by the Court. They were indicated with the purpose of being implemented (see *Nuclear Tests (Australia* v. *France), Interim Protection, Order of 22 June 1973, I.C.J. Reports 1973*, p. 106; *Nuclear Tests (New Zealand* v. *France), Interim Protection, Order of 22 June 1973, I.C.J. Reports 1973*, p. 142; *Frontier Dispute, Provisional Measures, Order of 10 January 1986, I.C.J. Reports 1986*, p. 9, para. 18, and p. 11, para. 32, point 1 A; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993*, p. 23, para. 48, and p. 24, para. 52 B; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 13 September 1993, I.C.J. Reports 1993*, p. 349, para. 57, and p. 350, para. 61 (3); *Land and Maritime Boundary between Cameroon and Nigeria, Provisional Measures, Order of 15 March 1996, I.C.J. Reports 1996 (1)*, pp. 22-23, para. 41, and p. 24, para. 49 (1)).

104. Given the conclusions reached by the Court above in interpreting the text of Article 41 of the Statute in the light of its object and purpose, it does not consider it necessary to resort to the preparatory work in order to determine the meaning of that Article. The Court would nevertheless point out that the preparatory work of the Statute

does not preclude the conclusion that orders under Article 41 have binding force.

105. The initial preliminary draft of the Statute of the Permanent Court of International Justice, as prepared by the Committee of Jurists established by the Council of the League of Nations, made no mention of provisional measures. A provision to this effect was inserted only at a later stage in the draft prepared by the Committee, following a proposal from the Brazilian jurist Raul Fernandes.

Basing himself on the Bryan Treaty of 13 October 1914 between the United States and Sweden, Raul Fernandes had submitted the following text:

> "Dans le cas où la cause du différend consiste en actes déterminés déjà effectués ou sur le point de l'être, la Cour pourra ordonner, dans le plus bref délai, à titre provisoire, des mesures conservatoires adéquates, en attendant le jugement définitif." (Comité consultatif de juristes, *Procès-verbaux des séances du comité*, 16 juin-24 juillet 1920 (avec annexes), La Haye, 1920, p. 609.)

In its English translation this text read as follows:

> "In case the cause of the dispute should consist of certain acts already committed or about to be committed, the Court may, provisionally and with the least possible delay, order adequate protective measures to be taken, pending the final judgment of the Court." (Advisory Committee of Jurists, *Procès-verbaux of the Proceedings of the Committee*, 16 June-24 July 1920 (with Annexes), The Hague, 1920, p. 609.)

The Drafting Committee prepared a new version of this text, to which two main amendments were made: on the one hand, the words "la Cour pourra ordonner" ("the Court may . . . order") were replaced by "la Cour a le pouvoir d'indiquer" ("the Court shall have the power to suggest"), while, on the other, a second paragraph was added providing for notice to be given to the parties and to the Council of the "measures suggested" by the Court. The draft Article 2*bis* as submitted by the Drafting Committee thus read as follows:

> "Dans le cas où la cause du différend consiste en un acte effectué ou sur le point de l'être, la Cour a le pouvoir d'indiquer, si elle estime que les circonstances l'exigent, quelles mesures conservatoires du droit de chacun doivent être prises à titre provisoire.
>
> En attendant son arrêt, cette suggestion de la Cour est immédiatement transmise aux parties et au Conseil." (Comité consultatif de juristes, *Procès-verbaux des séances du comité*, 16 juin-24 juillet 1920 (avec annexes), La Haye, 1920, p. 567-568.)

The English version read:

> "If the dispute arises out of an act which has already taken place or which is imminent, the Court shall have the power to suggest, if it

considers that circumstances so require, the provisional measures that should be taken to preserve the respective rights of either party.

Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and the Council." (Advisory Committee of Jurists, *Procès-verbaux of the Proceedings of the Committee*, 16 June-24 July 1920 (with Annexes), The Hague, 1920, pp. 567-568.)

The Committee of Jurists eventually adopted a draft Article 39, which amended the former Article 2*bis* only in its French version: in the second paragraph, the words "cette suggestion" were replaced in French by the words "l'indication".

106. When the draft Article 39 was examined by the Sub-Committee of the Third Committee of the first Assembly of the League of Nations, a number of amendments were considered. Raul Fernandes suggested again to use the word "ordonner" in the French version. The Sub-Committee decided to stay with the word "indiquer", the Chairman of the Sub-Committee observing that the Court lacked the means to execute its decisions. The language of the first paragraph of the English version was then made to conform to the French text: thus the word "suggest" was replaced by "indicate", and "should" by "ought to". However, in the second paragraph of the English version, the phrase "measures suggested" remained unchanged.

The provision thus amended in French and in English by the Sub-Committee was adopted as Article 41 of the Statute of the Permanent Court of International Justice. It passed as such into the Statute of the present Court without any discussion in 1945.

107. The preparatory work of Article 41 shows that the preference given in the French text to "indiquer" over "ordonner" was motivated by the consideration that the Court did not have the means to assure the execution of its decisions. However, the lack of means of execution and the lack of binding force are two different matters. Hence, the fact that the Court does not itself have the means to ensure the execution of orders made pursuant to Article 41 is not an argument against the binding nature of such orders.

108. The Court finally needs to consider whether Article 94 of the United Nations Charter precludes attributing binding effect to orders indicating provisional measures. That Article reads as follows:

"1. Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.

2. If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it

> deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment."

The question arises as to the meaning to be attributed to the words "the decision of the International Court of Justice" in paragraph 1 of this Article. This wording could be understood as referring not merely to the Court's judgments but to any decision rendered by it, thus including orders indicating provisional measures. It could also be interpreted to mean only judgments rendered by the Court as provided in paragraph 2 of Article 94. In this regard, the fact that in Articles 56 to 60 of the Court's Statute both the word "decision" and the word "judgment" are used does little to clarify the matter.

Under the first interpretation of paragraph 1 of Article 94, the text of the paragraph would confirm the binding nature of provisional measures; whereas the second interpretation would in no way preclude their being accorded binding force under Article 41 of the Statute. The Court accordingly concludes that Article 94 of the Charter does not prevent orders made under Article 41 from having a binding character.

109. In short, it is clear that none of the sources of interpretation referred to in the relevant Articles of the Vienna Convention on the Law of Treaties, including the preparatory work, contradict the conclusions drawn from the terms of Article 41 read in their context and in the light of the object and purpose of the Statute. Thus, the Court has reached the conclusion that orders on provisional measures under Article 41 have binding effect.

*

110. The Court will now consider the Order of 3 March 1999. This Order was not a mere exhortation. It had been adopted pursuant to Article 41 of the Statute. This Order was consequently binding in character and created a legal obligation for the United States.

*

111. As regards the question whether the United States has complied with the obligation incumbent upon it as a result of the Order of 3 March 1999, the Court observes that the Order indicated two provisional measures, the first of which states that

> "[t]he United States of America should take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings, and should inform the Court of all the measures which it has taken in implementation of this Order".

The second measure required the Government of the United States to

"transmit this Order to the Governor of the State of Arizona". The information required on the measures taken in implementation of this Order was given to the Court by a letter of 8 March 1999 from the Legal Counsellor of the United States Embassy at The Hague. According to this letter, on 3 March 1999 the State Department had transmitted to the Governor of Arizona a copy of the Court's Order. "In view of the extremely late hour of the receipt of the Court's Order", the letter of 8 March went on to say, "no further steps were feasible".

The United States authorities have thus limited themselves to the mere transmission of the text of the Order to the Governor of Arizona. This certainly met the requirement of the second of the two measures indicated. As to the first measure, the Court notes that it did not create an obligation of result, but that the United States was asked to "take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings". The Court agrees that due to the extremely late presentation of the request for provisional measures, there was certainly very little time for the United States authorities to act.

112. The Court observes, nevertheless, that the mere transmission of its Order to the Governor of Arizona without any comment, particularly without even so much as a plea for a temporary stay and an explanation that there is no general agreement on the position of the United States that orders of the International Court of Justice on provisional measures are non-binding, was certainly less than could have been done even in the short time available. The same is true of the United States Solicitor General's categorical statement in his brief letter to the United States Supreme Court that "an order of the International Court of Justice indicating provisional measures is not binding and does not furnish a basis for judicial relief" (see paragraph 33 above). This statement went substantially further than the amicus brief referred to in a mere footnote in his letter, which was filed on behalf of the United States in earlier proceedings before the United States Supreme Court in the case of Angel Francisco Breard (see *Breard* v. *Greene*, United States Supreme Court, 14 April 1998, *International Legal Materials*, Vol. 37 (1998), p. 824; Memorial of Germany, Ann. 34). In that amicus brief, the same Solicitor General had declared less than a year earlier that "there is substantial disagreement among jurists as to whether an ICJ order indicating provisional measures is binding . . . The better reasoned position is that such an order is not binding."

113. It is also noteworthy that the Governor of Arizona, to whom the

Court's Order had been transmitted, decided not to give effect to it, even though the Arizona Clemency Board had recommended a stay of execution for Walter LaGrand.

114. Finally, the United States Supreme Court rejected a separate application by Germany for a stay of execution, "[g]iven the tardiness of the pleas and the jurisdictional barriers they implicate". Yet it would have been open to the Supreme Court, as one of its members urged, to grant a preliminary stay, which would have given it "time to consider, after briefing from all interested parties, the jurisdictional and international legal issues involved . . ." (*Federal Republic of Germany et al.* v. *United States et al.*, United States Supreme Court, 3 March 1999).

115. The review of the above steps taken by the authorities of the United States with regard to the Order of the International Court of Justice of 3 March 1999 indicates that the various competent United States authorities failed to take all the steps they could have taken to give effect to the Court's Order. The Order did not require the United States to exercise powers it did not have; but it did impose the obligation to "take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings . . .". The Court finds that the United States did not discharge this obligation.

Under these circumstances the Court concludes that the United States has not complied with the Order of 3 March 1999.

116. The Court observes finally that in the third submission Germany requests the Court to adjudge and declare only that the United States violated its international legal obligation to comply with the Order of 3 March 1999; it contains no other request regarding that violation. Moreover, the Court points out that the United States was under great time pressure in this case, due to the circumstances in which Germany had instituted the proceedings. The Court notes moreover that at the time when the United States authorities took their decision the question of the binding character of orders indicating provisional measures had been extensively discussed in the literature, but had not been settled by its jurisprudence. The Court would have taken these factors into consideration had Germany's submission included a claim for indemnification.

* *

117. Finally, the Court will consider Germany's fourth submission, in which it asks the Court to adjudge and declare

> "that the United States shall provide Germany an assurance that it will not repeat its unlawful acts and that, in any future cases of detention of or criminal proceedings against German nationals, the United States will ensure in law and practice the effective exercise of

the rights under Article 36 of the Vienna Convention on Consular Relations. In particular in cases involving the death penalty, this requires the United States to provide effective review of and remedies for criminal convictions impaired by a violation of the rights under Article 36."

118. Germany states that:

"[c]oncerning the requested assurances and guarantees of non-repetition of the United States, they are appropriate because of the existence of a real risk of repetition and the seriousness of the injury suffered by Germany. Further, the choice of means by which full conformity of the future conduct of the United States with Article 36 of the Vienna Convention is to be ensured may be left to the United States."

Germany explains that:

"the effective exercise of the right to consular notification embodied in [Article 36,] paragraph 2, requires that, where it cannot be excluded that the judgment was impaired by the violation of the right to consular notification, appellate proceedings allow for a reversal of the judgment and for either a retrial or a re-sentencing".

Finally, Germany points out that its fourth submission has been so worded "as to . . . leave the choice of means by which to implement the remedy [it seeks] to the United States".

119. In reply, the United States argues as follows:

"Germany's fourth submission is clearly of a wholly different nature than its first three submissions. Each of the first three submissions seeks a judgment and declaration by the Court that a violation of a stated international legal obligation has occurred. Such judgments are at the core of the Court's function, as an aspect of reparation.

. . . . . .

In contrast, however, to the character of the relief sought in the first three submissions, the requirement of assurances of non-repetition sought in the fourth submission has no precedent in the jurisprudence of this Court and would exceed the Court's jurisdiction and authority in this case. It is exceptional even as a non-legal undertaking in State practice, and it would be entirely inappropriate for the Court to require such assurances with respect to the duty to inform undertaken in the Consular Convention in the circumstances of this case."

It points out that "US authorities are working energetically to strengthen the regime of consular notification at the state and local level throughout the United States, in order to reduce the chances of cases such as this recurring" and adds that:

> "the German request for an assurance as to the duty to inform foreign nationals without delay of their right to consular notification . . . seeks to have the Court require the United States to assure that it will never again fail to inform a German foreign national of his or her right to consular notification",

and that "the Court is aware that the United States is not in a position to provide such an assurance". The United States further contends that it "has already provided appropriate assurances to Germany on this point".

Finally, the United States recalls that:

> "[w]ith respect to the alleged breach of Article 36, paragraph 2, . . . Germany seeks an assurance that, 'in any future cases of detention of or criminal proceedings against German nationals, the United States will ensure in law and practice the effective exercise of the rights under Article 36'".

According to the United States,

> "[such an assurance] is again absolute in character . . . [and] seeks to create obligations on the United States that exceed those that are contained in the Vienna Convention. For example, the requirement of consular notification under Article 36, paragraph 1 *(b)*, of the Convention applies when a foreign national is arrested, committed to prison or to custody pending trial or detained in any other manner. It does not apply, as the submission would have it, to any future criminal proceedings. That is a new obligation, and it does not arise out of the Vienna Convention."

The United States further observes that:

> "[e]ven if this Court were to agree that, as a result of the application of procedural default with respect to the claims of the LaGrands, the United States committed a second internationally wrongful act, it should limit that judgment to the application of that law in the particular case of the LaGrands. It should resist the invitation to require an absolute assurance as to the application of US domestic law in all such future cases. The imposition of such an additional obligation on the United States would . . . be unprecedented in international jurisprudence and would exceed the Court's authority and jurisdiction."

120. The Court observes that in its fourth submission Germany seeks

several assurances. First it seeks a straightforward assurance that the United States will not repeat its unlawful acts. This request does not specify the means by which non-repetition is to be assured.

Additionally, Germany seeks from the United States that

> "in any future cases of detention of or criminal proceedings against German nationals, the United States will ensure in law and practice the effective exercise of the rights under Article 36 of the Vienna Convention on Consular Relations".

This request goes further, for, by referring to the law of the United States, it appears to require specific measures as a means of preventing recurrence.

Germany finally requests that

> "[i]n particular in cases involving the death penalty, this requires the United States to provide effective review of and remedies for criminal convictions impaired by a violation of the rights under Article 36".

This request goes even further, since it is directed entirely towards securing specific measures in cases involving the death penalty.

121. Turning first to the general demand for an assurance of non-repetition, the Court observes that it has been informed by the United States of the "substantial measures [which it is taking] aimed at preventing any recurrence" of the breach of Article 36, paragraph 1 *(b)*. Throughout these proceedings, oral as well as written, the United States has insisted that it "keenly appreciates the importance of the Vienna Convention's consular notification obligation for foreign citizens in the United States as well as for United States citizens travelling and living abroad"; that "effective compliance with the consular notification requirements of Article 36 of the Vienna Convention requires constant effort and attention"; and that

> "the Department of State is working intensively to improve understanding of and compliance with consular notification and access requirements throughout the United States, so as to guard against future violations of these requirements".

The United States points out that

> "[t]his effort has included the January 1998 publication of a booklet entitled 'Consular Notification and Access: Instructions for Federal, State and Local Law Enforcement and Other Officials Regarding

> Foreign Nationals in the United States and the Rights of Consular Officials to Assist Them', and development of a small reference card designed to be carried by individual arresting officers".

According to the United States, it is estimated that until now over 60,000 copies of the brochure as well as over 400,000 copies of the pocket card have been distributed to federal, state and local law enforcement and judicial officials throughout the United States. The United States is also conducting training programmes reaching out to all levels of government. In the Department of State a permanent office to focus on United States and foreign compliance with consular notification and access requirements has been created.

122. Germany has stated that it "does not consider the so-called 'assurances' offered by the Respondent as adequate". It says

> "[v]iolations of Article 36 followed by death sentences and executions cannot be remedied by apologies or the distribution of leaflets. An effective remedy requires certain changes in US law and practice".

In order to illustrate its point, Germany has presented to the Court a "[l]ist of German nationals detained after January 1, 1998, who claim not to have been informed of their consular rights". The United States has criticized this list as misleading and inaccurate.

123. The Court notes that the United States has acknowledged that, in the case of the LaGrand brothers, it did not comply with its obligations to give consular notification. The United States has presented an apology to Germany for this breach. The Court considers however that an apology is not sufficient in this case, as it would not be in other cases where foreign nationals have not been advised without delay of their rights under Article 36, paragraph 1, of the Vienna Convention and have been subjected to prolonged detention or sentenced to severe penalties.

In this respect, the Court has taken note of the fact that the United States repeated in all phases of these proceedings that it is carrying out a vast and detailed programme in order to ensure compliance by its competent authorities at the federal as well as at the state and local levels with its obligation under Article 36 of the Vienna Convention.

124. The United States has provided the Court with information, which it considers important, on its programme. If a State, in proceedings before this Court, repeatedly refers to substantial activities which it

is carrying out in order to achieve compliance with certain obligations under a treaty, then this expresses a commitment to follow through with the efforts in this regard. The programme in question certainly cannot provide an assurance that there will never again be a failure by the United States to observe the obligation of notification under Article 36 of the Vienna Convention. But no State could give such a guarantee and Germany does not seek it. The Court considers that the commitment expressed by the United States to ensure implementation of the specific measures adopted in performance of its obligations under Article 36, paragraph 1 *(b)*, must be regarded as meeting Germany's request for a general assurance of non-repetition.

125. The Court will now examine the other assurances sought by Germany in its fourth submission. The Court observes in this regard that it can determine the existence of a violation of an international obligation. If necessary, it can also hold that a domestic law has been the cause of this violation. In the present case the Court has made its findings of violations of the obligations under Article 36 of the Vienna Convention when it dealt with the first and the second submission of Germany. But it has not found that a United States law, whether substantive or procedural in character, is inherently inconsistent with the obligations undertaken by the United States in the Vienna Convention. In the present case the violation of Article 36, paragraph 2, was caused by the circumstances in which the procedural default rule was applied, and not by the rule as such.

In the present proceedings the United States has apologized to Germany for the breach of Article 36, paragraph 1, and Germany has not requested material reparation for this injury to itself and to the LaGrand brothers. It does, however, seek assurances:

> "that, in any future cases of detention or of criminal proceedings against German nationals, the United States will ensure in law and practice the effective exercise of the rights under Article 36 of the Vienna Convention on Consular Relations",

and that

> "[i]n particular in cases involving the death penalty, this requires the United States to provide effective review of and remedies for criminal convictions impaired by the violation of the rights under Article 36".

The Court considers in this respect that if the United States, notwithstanding its commitment referred to in paragraph 124 above, should fail in its obligation of consular notification to the detriment of German nationals, an apology would not suffice in cases where the individuals concerned have been subjected to prolonged detention or convicted and

sentenced to severe penalties. In the case of such a conviction and sentence, it would be incumbent upon the United States to allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention. This obligation can be carried out in various ways. The choice of means must be left to the United States.

126. Given the foregoing ruling by the Court regarding the obligation of the United States under certain circumstances to review and reconsider convictions and sentences, the Court need not examine Germany's further argument which seeks to found a like obligation on the contention that the right of a detained person to be informed without delay pursuant to Article 36, paragraph 1, of the Vienna Convention is not only an individual right but has today assumed the character of a human right.

127. In reply to the fourth submission of Germany, the Court will therefore limit itself to taking note of the commitment undertaken by the United States to ensure implementation of the specific measures adopted in performance of its obligations under Article 36, paragraph 1 *(b)*, of the Vienna Convention, as well as the aforementioned duty of the United States to address violations of that Convention should they still occur in spite of its efforts to achieve compliance.

* * *

128. For these reasons,

THE COURT,

(1) By fourteen votes to one,

Finds that it has jurisdiction, on the basis of Article I of the Optional Protocol concerning the Compulsory Settlement of Disputes to the Vienna Convention on Consular Relations of 24 April 1963, to entertain the Application filed by the Federal Republic of Germany on 2 March 1999;

IN FAVOUR: *President* Guillaume; *Vice-President* Shi; *Judges* Oda, Bedjaoui, Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Kooijmans, Rezek, Al-Khasawneh, Buergenthal;

AGAINST: *Judge* Parra-Aranguren;

(2) *(a)* By thirteen votes to two,

Finds that the first submission of the Federal Republic of Germany is admissible;

IN FAVOUR: *President* Guillaume; *Vice-President* Shi; *Judges* Bedjaoui, Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Kooijmans, Rezek, Al-Khasawneh, Buergenthal;

AGAINST: *Judges* Oda, Parra-Aranguren;

(b) By fourteen votes to one,

Finds that the second submission of the Federal Republic of Germany is admissible;

IN FAVOUR: *President* Guillaume; *Vice-President* Shi; *Judges* Bedjaoui, Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal;

AGAINST: *Judge* Oda;

(c) By twelve votes to three,

Finds that the third submission of the Federal Republic of Germany is admissible;

IN FAVOUR: *President* Guillaume; *Vice-President* Shi; *Judges* Bedjaoui, Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Kooijmans, Rezek, Al-Khasawneh;

AGAINST: *Judges* Oda, Parra-Aranguren, Buergenthal;

(d) By fourteen votes to one,

Finds that the fourth submission of the Federal Republic of Germany is admissible;

IN FAVOUR: *President* Guillaume; *Vice-President* Shi; *Judges* Bedjaoui, Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal;

AGAINST: *Judge* Oda;

(3) By fourteen votes to one,

Finds that, by not informing Karl and Walter LaGrand without delay following their arrest of their rights under Article 36, paragraph 1 *(b)*, of the Convention, and by thereby depriving the Federal Republic of Germany of the possibility, in a timely fashion, to render the assistance provided for by the Convention to the individuals concerned, the United States of America breached its obligations to the Federal Republic of Germany and to the LaGrand brothers under Article 36, paragraph 1;

IN FAVOUR: *President* Guillaume; *Vice-President* Shi; *Judges* Bedjaoui, Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal;

AGAINST: *Judge* Oda;

(4) By fourteen votes to one,

Finds that, by not permitting the review and reconsideration, in the light of the rights set forth in the Convention, of the convictions and sentences of the LaGrand brothers after the violations referred to in paragraph (3) above had been established, the United States of America breached its obligation to the Federal Republic of Ger-

many and to the LaGrand brothers under Article 36, paragraph 2, of the Convention;

IN FAVOUR: *President* Guillaume; *Vice-President* Shi; *Judges* Bedjaoui, Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal;

AGAINST: *Judge* Oda;

(5) By thirteen votes to two,

Finds that, by failing to take all measures at its disposal to ensure that Walter LaGrand was not executed pending the final decision of the International Court of Justice in the case, the United States of America breached the obligation incumbent upon it under the Order indicating provisional measures issued by the Court on 3 March 1999;

IN FAVOUR: *President* Guillaume; *Vice-President* Shi; *Judges* Bedjaoui, Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Kooijmans, Rezek, Al-Khasawneh, Buergenthal;

AGAINST: *Judges* Oda, Parra-Aranguren;

(6) Unanimously,

Takes note of the commitment undertaken by the United States of America to ensure implementation of the specific measures adopted in performance of its obligations under Article 36, paragraph 1 *(b)*, of the Convention; and *finds* that this commitment must be regarded as meeting the Federal Republic of Germany's request for a general assurance of non-repetition;

(7) By fourteen votes to one,

Finds that should nationals of the Federal Republic of Germany nonetheless be sentenced to severe penalties, without their rights under Article 36, paragraph 1 *(b)*, of the Convention having been respected, the United States of America, by means of its own choosing, shall allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in that Convention.

IN FAVOUR: *President* Guillaume; *Vice-President* Shi; *Judges* Bedjaoui, Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal;

AGAINST: *Judge* Oda.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this twenty-seventh day of June, two thousand and one, in three copies, one of which will be placed in the archives

of the Court and the others transmitted to the Government of the Federal Republic of Germany and the Government of the United States of America, respectively.

(Signed) Gilbert GUILLAUME,
President.

(Signed) Philippe COUVREUR,
Registrar.

President GUILLAUME makes the following declaration:

Subparagraph (7) of the operative part of the Court's Judgment envisages a situation where, despite the commitment by the United States noted by the Court in subparagraph (6), a severe penalty is imposed upon a German national without his or her rights under Article 36, paragraph 1 *(b)*, of the Vienna Convention on Consular Relations having been respected. The Court states that, in such a case, "the United States, by means of its own choosing, shall allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in that Convention".

This subparagraph represents a response to certain submissions by Germany and hence rules only on the obligations of the United States in cases of severe penalties imposed upon German nationals.

Thus, subparagraph (7) does not address the position of nationals of other countries or that of individuals sentenced to penalties that are not of a severe nature. However, in order to avoid any ambiguity, it should be made clear that there can be no question of applying an *a contrario* interpretation to this paragraph.

(Signed) Gilbert GUILLAUME.

Vice-President SHI appends a separate opinion to the Judgment of the Court; Judge ODA appends a dissenting opinion to the Judgment of the Court; Judges KOROMA and PARRA-ARANGUREN append separate opinions to the Judgment of the Court; Judge BUERGENTHAL appends a dissenting opinion to the Judgment of the Court.

(Initialled) G.G.

(Initialled) Ph.C.

INTERNATIONAL COURT OF JUSTICE

CASE CONCERNING AVENA AND OTHER MEXICAN NATIONALS

(MEXICO v. UNITED STATES OF AMERICA)

MEMORIAL OF MEXICO

20 June 2003

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I.

INTRODUCTION

1. By Application dated 9 January 2003, Mexico instituted proceedings before this Court against the United States on claims concerning fifty-four Mexican nationals who have been convicted and sentenced to death in criminal proceedings that violated the provisions of Article 36 of the Vienna Convention on Consular Relations. By Order dated 5 February 2003, the Court ordered the United States to take all steps necessary to ensure that the three nationals in most imminent danger of execution were not executed before the Court rendered judgment on Mexico's claims. To date, no execution date has been set for any of the Mexican nationals who are the subject of this proceeding.

2. Thus, this case comes to the Court in a fundamentally different posture than did *LaGrand*, and for the most basic of reasons: while the nationals who were the subject of Germany's application had been executed prior to the rendering of the Court's judgment, the nationals that Mexico here seeks to protect remain alive. In *LaGrand*, the Court had occasion to provide a definitive interpretation of the substantive rights of the sending State and its nationals under Article 36, and the corresponding obligations of the receiving State under that Article. As a result, Mexico's case rests on the substantive foundation laid by the Court in *LaGrand*. But here, the Court will also have an opportunity to prescribe the full range of relief to which a State aggrieved by Article 36 violations is entitled, in a situation in which the nationals who are the subject of the proceeding remain in a position to benefit from that relief.

3. Put simply, Mexico contends that when a State acts to take human life through the application of law in a criminal proceeding, it should scrupulously conform its own conduct to the dictates of legal norms to which it has consented to be bound – including, as here, Article 36 of the Vienna Convention. And when the State fails in that obligation – as here, the United States has – it should provide fully effective relief in the form of new proceedings that conform to those dictates.

4. Like the United States, Mexico attaches great importance to the consular assistance and access rights codified in Article 36, particularly in the case of nationals charged with capital crimes. Over time, Mexico has created a comprehensive program of consular assistance to its detained nationals in the United States who face the death penalty.

Mexican consular officers act to ensure fair treatment of their nationals in U.S. criminal proceedings, provide the national with an understanding of the U.S. criminal system and his legal rights, closely monitor judicial proceedings, advocate before judges and prosecutors, regularly communicate with the detained national and his relatives, assist in the thorough investigation of facts, arrange and fund expert testimony, and, where necessary, provide funds for the retention of more qualified defense counsel.

5. The right of consular notification and assistance is a necessary and essential procedural safeguard for detained foreign nationals. As the drafters of Article 36 recognized, the foreign national facing criminal charges stands on a different footing than a national facing the same charges. And it is the criminal defendant's status as foreign national, rather than simply criminal defendant, to which the rights guaranteed by Article 36 are addressed.

6. The right of consular notification and assistance therefore constitutes a fundamental component of due process. The assisting consular officer can bring to bear professional expertise and local knowledge that can be used to protect the foreign national from the vulnerable position he or she occupies in the receiving State. Further, consular notification and assistance serve to ensure the effective enforcement of all other due process guarantees. For a detained foreign national, the right to be informed of the prospect of consular assistance is the necessary prerequisite to a knowing decision regarding whether to exercise or waive the right against self-incrimination, to the effective assistance of counsel, and to the opportunity to prepare a defense. As a result, the fundamental due process character of the right to consular access has been recognized in international instruments, tribunal decisions, state practice, and scholarly writings.

7. Given the critical role of the right of consular notification, a criminal proceeding that has been tainted by a violation of that right – as in the case of each of the fifty-four Mexican nationals before this Court – cannot yield a substantively acceptable conviction or sentence. This principle applies with special force in capital proceedings, which, given the irreversible character of the death penalty, require the most rigorous enforcement of procedural safeguards.

8. Yet in each and every one of the fifty-four separate capital cases that form the basis of this action, the United States has violated

Mexico's rights and the rights of its nationals under the Vienna Convention, which Mexico asserts in the exercise of its right of diplomatic protection. As in *LaGrand*, the United States has breached two separate provisions of Article 36.

9. *First*, as this Court authoritatively determined in the *LaGrand* case, the interlocking subsections of Article 36(1) of the Vienna Convention establish a system of consular protection predicated upon the requirement that competent authorities of a receiving state notify, without delay, a detained national of a sending State of his right to consular communication and assistance. To be effective, notification "without delay" requires that the competent authorities provide the contemplated consular notification prior to any act potentially detrimental to the rights of the foreign nationals, such as interrogation.

10. This functional definition is supported by the object and purpose of the Vienna Convention, the well-documented vulnerability of foreign nationals in custody to abuse during interrogation, and the United States's own practice with regard to the protection of U.S. nationals detained in other states.

11. In the cases of fifty-one of the Mexican nationals sentenced to death whose cases form the basis of this proceeding, the United States made no attempt to comply with Article 36(1) of the Vienna Convention, even though the competent authorities had reason to know of the detainee's Mexican nationality. In only three cases did the competent authorities make an effort to provide notice to the detained Mexican national, but in those cases, the notice was either not conveyed in full or not conveyed "without delay," as the Convention requires.

12. *Second*, the United States violated Article 36(2) by invoking municipal law bars to prevent Mexican nationals from challenging their convictions and death sentences on the basis of violations of Article 36. In *LaGrand*, this Court held that Article 36(2) requires that municipal laws and regulations be applied in a manner that allows "full effect" to be given to "the purposes for which the rights accorded under this Article are intended." A receiving state violates the Convention when its laws prevent the municipal courts of that State "from attaching any legal significance to the fact...[of] the violation."

13. The United States employs municipal law bars that do not allow the attribution of legal consequences to the failure of competent

authorities of the United States to provide the requisite Article 36 notification. United States courts have applied procedural default doctrines to hold that where a Mexican national has not raised his Vienna Convention claim during the prescribed phase of the criminal proceeding, he is barred from raising it subsequently. For example, where the national has not raised the claim during the course of trial, he may not raise it on direct appeal. Likewise if the national fails to raise a claim on direct appeal or in state post-judgment proceedings, he may not raise it in any subsequent federal *habeas corpus* proceedings. Thus, state and federal default doctrines bar review and reconsideration of Vienna Convention claims, even where the failure of the defendant to raise his Vienna Convention claims is a direct result of the United States's own failure to provide the required notification.

14. United States courts have also held that pursuant to a non-retroactivity doctrine, Mexican nationals are barred from any judicial relief for acknowledged Vienna Convention violations in federal *habeas corpus* proceedings. Finally, even where Mexican nationals' claims have not been defaulted, United States courts refuse to provide judicial remedies for the violations, on the ground that the Vienna Convention does not create individual or fundamental rights, or that, in any event, the defendant Mexican national has not shown prejudice from the United States's failure to abide by its obligations under Article 36.

15. The continued application of these municipal law doctrines violates not only the plain dictates of Article 36(2), but the equally plain mandate of *LaGrand*, in which this Court held that in cases implicating severe punishment, the United States was required to permit review and reconsideration of impaired convictions and sentences that take account of the Vienna Convention violation.

16. In an attempt to meet that mandate, the United States takes the position that state clemency processes provide the requisite review and reconsideration. To the contrary, the Vienna Convention confers rights both on the sending State and its nationals. Review and reconsideration that takes account of the Vienna Convention must therefore take account of the deprivation of a right and, it follows, provide a rights-based remedy. Clemency, by contrast, is just that: a discretionary act of executive grace, to which no applicant has a right, and the grant of which cannot be assured no matter how egregious the violation that the applicant might show. Moreover, as conducted, clemency processes are generally standardless, secretive, and immune from judicial oversight.

Clemency processes cannot serve to fulfill the United States' obligation to give full effect to the purpose for which the rights afforded under Article 36 are intended.

17. To remedy the United States' violations of Article 36(1) and (2) in the criminal proceedings in which the Mexican nationals who are subject to this proceeding have been convicted of capital crimes and sentenced to death, Mexico is entitled to full reparations. Mexico seeks no monetary compensation. Nor does it seek a blanket pardon or any other form of relief that would prevent the United States from retrying or resentencing its nationals in proceedings that comport with Article 36.

18. Mexico seeks, instead, only that relief which is essential to ensure that any of its nationals who are put in jeopardy of their lives in capital criminal proceedings in the United States receive the procedural safeguards that, by its adherence to the Vienna Convention, the United States has agreed to provide. Specifically, Mexico seeks reparations in the form of appropriate declarations, *restitutio in integrum*, an order of cessation, and guarantees of non-repetition.

19. The remedial starting point is *restitutio in integrum*. As the primary form of reparation available, *restitutio in integrum* seeks to re-establish the situation that existed prior to the commission of the internationally wrongful act. To restore the *status quo ante* in the circumstances of this case, the United States must take several separate and independent steps.

20. *First*, the United States must take all steps necessary to ensure the *vacatur* of the convictions and sentences of the fifty-four Mexican nationals, so that any subsequent criminal proceedings can be undertaken in conformity with international law. The annulment of judicial decisions is a well-recognized form of restitution, and is especially compelling where, as here, criminal proceedings have been tainted by violations of fundamental due process.

21. *Second*, the Court should require that the United States take all steps necessary to ensure the exclusion of evidence obtained in violation of Article 36. The rule excluding from use in criminal proceedings evidence obtained illegally is a general principle of law under Article 38(1)(c) of the Court's Statute and, in the circumstances here, requires that prosecuting authorities be barred from using in evidence statements

and confessions obtained prior to the time a foreign national is informed of his consular notification rights.

22. *Finally*, *restitutio* requires that courts in the United States be prohibited from applying any municipal law doctrine that prevents a court from attributing legal significance to an Article 36 violation because of a foreign national's failure timely to raise the Vienna Convention claim where the competent authorities have failed in their obligation to apprise the national of his rights, or any doctrine that prevents the Court from providing a remedy for an Article 36 violation, or any doctrine that requires a defendant to make an individualized showing of prejudice as a prerequisite to relief.

23. Since *LaGrand*, and contrary to the sanguine assertions of the United States about its education and training program, competent authorities in the United States continue regularly to violate the Article 36 notification provisions of the Vienna Convention, including in capital cases or other cases involving severe penalties. For example, Mexico has been apprised by its consulates of over one hundred cases since 27 June 2001 involving severe penalties in which the United States has failed to provide the requisite consular notification.

24. As a result, Mexico seeks orders from the Court that the United States cease its ongoing violations of Article 36 and, at the same time, provide Mexico with specific guarantees that its competent authorities will regularly comply with their obligations under that Article. The United States should be required to employ whatever legislative, executive, or judicial means are necessary to achieve that result.

25. This case is the third in which a State Party to the Vienna Convention on Consular Relations has sought relief on the basis of violations by the United States of Article 36 in criminal proceedings that led to the death penalty. Paraguay obtained an order of provisional measures barring the execution of its national pending the Court's judgment on the merits, but then withdrew the case after the United States, in violation of that order, allowed the execution to go forward. Germany, too, saw its national executed in violation of an order of provisional measures, but carried the case through to a judgment that allowed the Court to provide a definitive treatment of the substantive mandate of Article 36.

26. Mexico is the third State to file and to obtain an order of provisional measures. Thus far, the United States has complied with that order. Mexico hopes that, by prescribing the full range of relief that Mexico seeks in these proceedings, the Court will provide a definitive treatment of the remedial dimension of the Vienna Convention and thereby complete its work on that instrument. Equally, Mexico hopes that that work will increase the respect for and compliance with law that is the surest safeguard of international peace and justice.

II.

JURISDICTION

27. The Court's jurisdiction is based on Article I of the Optional Protocol to the Vienna Convention on Consular Relations, on which the Court based its jurisdiction in *LaGrand*.[1] Article I of the Optional Protocol provides that

> [d]isputes arising out of the interpretation or application of the [Vienna Convention on Consular Relations] shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a party to the present Protocol.[2]

28. Article I establishes two requirements for the Court to have jurisdiction. *First*, the Applicant must be a party to the Optional Protocol. *Second*, there must be a dispute "arising out of the interpretation or application" of the Vienna Convention on Consular Relations. According to this Court's long-standing jurisprudence, these jurisdictional requirements must be met as of the date of the filing of the Application, which is the critical date for the Court to determine its jurisdiction.[3] Both requirements are met here.

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[1] *LaGrand (Germany v. United States of America), Judgment*, I.C.J. Reports 2001, paras. 42, 128(1).

[2] Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes, 24 April 1963, 596 UNTS 487, Article I.

[3] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment of 14 February 2002*, para. 26; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Preliminary Objections, Judgment, I.C.J., Reports 1998*, pp. 23-24, para. 38; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United*

29. *First*, on 9 January 2003, when the Application was filed, Mexico and the United States of America were both parties to the Vienna Convention on Consular Relations and to the Optional Protocol. The United States has been a party to both the Vienna Convention and to its Optional Protocol since 24 November 1969. Mexico, in its turn, has been a party to the Vienna Convention since 16 June 1965, and acceded to the Optional Protocol on 15 March 2002. Neither of the two parties made any reservations to the Optional Protocol.[4]

30. *Second*, on 9 January 2003, there existed between Mexico and the United States a dispute "arising out of the interpretation or application" of the Vienna Convention. Prior to the filing of the Application, Mexico undertook considerable diplomatic and legal efforts to vindicate its rights and those of its nationals under Article 36 of the Vienna Convention and has spared no effort to persuade the United States to comply with its obligations under the Vienna Convention.[5] All of these efforts failed. It is clear that Mexico and the United States hold irreconcilable views about the mandate of the Vienna Convention, including fundamental disagreements about the remedy to which the sending State and its nationals are entitled in the event of a breach of the Convention in a proceeding that leads to the death penalty.

31. Mexico has consistently argued that the United States must restore the *status quo ante*, that is, re-establish the situation that existed at the time of the detention and before the convictions and sentences of Mexico's nationals as a result of proceedings that violated the United States' obligations under the Vienna Convention. To date, the United States has made no effort to provide any remedy other than repeated apologies, which this Court determined clearly in *LaGrand* are

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States of America), Preliminary Objections, Judgment, I.C.J. Reports 1998, p. 129, para. 37.

[4] List of Participants, Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes, *available at http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIII/treaty33.asp* (last visited 16 June 2003).

[5] *See infra* Chapter III.D.

inadequate,[6] and discretionary reviews by executive officials, which Mexico maintains are equally inadequate.[7]

32. As this Court held in *LaGrand*, "a dispute regarding the appropriate remedies for the violation of the Convention . . . is a dispute that arises out of the interpretation or application of the Convention and thus is within the Court's jurisdiction.[8]

33. The Court thus has jurisdiction to entertain Mexico's claims.

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[6] *LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001*, para. 123.

[7] *See infra* Chapter IV.B.4.

[8] *LaGrand (Germany v. United States of America), Merits, Judgment, I.C.J.* Reports *2001*, para. 48; *see also Vienna Convention on Consular Relations (Paraguay* v. *United States of America), Provisional Measures, Order of 9 April 1998*, para. 31.

III.

STATEMENT OF FACTS

A. THE PURPOSE OF CONSULAR ASSISTANCE IN CAPITAL CASES

34. For many decades, Mexican consular officers have been dedicated to the protection of Mexican nationals incarcerated abroad. To that end, Mexico has established an extensive and sophisticated program of consular assistance for its citizens incarcerated in the United States.[9]

35. Ever since capital punishment was re-introduced in the United States in 1976, Mexico has closely monitored the cases of Mexican nationals facing the death penalty. Mexico's commitment to the defense of its nationals has been consistent and unwavering for more than twenty-five years. As the numbers of Mexican nationals on death row have increased, however, Mexico has devoted more resources to their defense, and has become increasingly concerned over repeated violations of Article 36 in their capital murder prosecutions.

36. Thus, in September 2000, Mexico formed the ground-breaking Mexican Capital Legal Assistance Program, which to date constitutes the sole capital legal assistance program established by a foreign government in the United States. The Program is staffed by a network of ten lawyers, all of whom are experienced capital litigators.[10] These lawyers, in turn, provide expert advice to consular officers and defense lawyers representing Mexican nationals. The Program has made a qualitative difference in the legal representation provided to Mexican nationals, and has enhanced the services already provided by Mexico's forty-five consulates in the United States. The Program also seeks to increase awareness of and compliance with international law.[11]

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[9] Mexico's history of consular assistance in the United States dates back to the turn of the century. *See* Declaration of Roberto Rodríguez Hernández, paras. 12-23 (detailing historical assistance), Annex 7.

[10] *See id.*

[11] *See* Declaration of Roberto Rodríguez Hernández, para. 30, Annex 7.

37. Among other services, Mexican consular officers ensure that detained nationals understand the U.S. criminal justice system and their legal rights; closely monitor judicial proceedings; advocate before judges and prosecutors; regularly communicate with detained nationals and their relatives; provide interpreters and translation services; provide funds and logistical support to assist defense counsel in obtaining documentary evidence and conducting investigations in Mexico; retain bilingual experts and investigators; assist in the thorough investigation of facts; arrange expert testimony where helpful; and, where necessary, obtain more qualified defense counsel for their nationals.[12]

38. Through the combined efforts of consular officers and the Program lawyers, Mexico has played a decisive role in preventing the imposition of the death penalty in at least forty-five cases in less than three years.[13] In that same time, Mexico has filed sixteen *amicus curiae* briefs in U.S. courts, has provided funds for investigators and experts in at least twenty-two cases, and has offered important legal assistance to defense counsel in sixty-seven other cases.[14]

39. Consular assistance to nationals detained on criminal charges can be broken down into four essential services. First, by their very presence in the courtroom or at the police station, consular officers ensure that local authorities treat their nationals fairly.[15] Second, consular officers speak to their nationals in a language they understand, and ensure the provision of adequate interpreters. Third, consular officers explain the detainee's legal rights and facilitate communications with defense attorneys and other actors in the criminal justice system, acting, in effect, as a "cultural bridge" for the detained foreign national. Fourth, consular officers enhance the quality of the detainee's legal

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[12] *See id.*, paras. 4-17.

[13] *See id.*, para. 31. In thirty-eight of those cases, prosecutors agreed to waive the death penalty prior to trial. In four cases, defendants were sentenced to life imprisonment after jury trials. And in three cases, the defendants' sentences were commuted to life in prison.

[14] *See id.*, para. 32.

[15] *See* L. Lee, *Consular Law and Practice* (2d ed. 1991), p.124.

representation by providing competent counsel, gathering documentary or other evidence from the home state, and apprising courts and counsel of international legal arguments.[16]

1. Mexican Consular Officers Ensure the General Fairness of Proceedings

40. Mexican consular officers, at the very minimum, ensure by their very presence that a foreign national is treated with fairness in the detaining state's judicial system.[17] Innumerable studies have shown that race and ethnicity play a significant role in the administration of the death penalty in the United States.[18] Mexico has documented numerous

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[16] *See* Lee, *supra*, at pp. 133-35, 166; United States State Department, Pub. No. 10518, *Consular Notification and Access: Instructions for Federal, State and Local Law Enforcement and Other Officials Regarding Foreign Nationals in the United States and the Rights of Consular officers to Assist Them* (released Jan. 1998) at 42; J. Sims & L. E. Carter, *Emerging Importance of the Vienna Convention on Consular Relations as a Defense Tool*, The Champion, Sept./Oct. 1998 at p. 30 ("Consular officers have a strong interest in the well-being of their nationals who are visiting or living in a foreign country...All governments want to monitor the criminal prosecutions of their nationals to ensure fair treatment."); S. A. Shank & J. Quigley, *Foreigners on Texas's Death Row and the Right of Access to a Consul*, 26 St. Mary's Law J. at pp. 719, 720-21 (1995) ("[T]he mere involvement of a consul may encourage local government to follow procedural norms and minimize discrimination against a foreigner.").

[17] *See* Declaration of Roberto Rodríguez, para. 9, Annex 7; C. Cooper, *Foes of Death Penalty Have a Friend Mexico*, Sacramento Bee, 26 June 1994, at A1 (noting Mexico's intervention in Kentucky and California capital cases where death penalty avoided); A. Mendieta, *Mexico Will Aid Nationals in US; Fund will Help 45 Death Row Inmates*, Chicago Sun-Times, 6 October 2000, at 18 (describing creation of legal assistance program to defend the rights of Mexican nationals sentenced to death in the United States and bolster recognition of rights under the Vienna Convention).

[18] *See, e.g.*, Department of Justice, *Survey of the Federal Death Penalty System* (1998-2000) (concluding that federal prosecutors seek the death penalty more often for Hispanics and other minorities than whites; and noting that in Pennsylvania, prosecutors are three times as likely to seek the death penalty against Hispanics); *Final Report of the Pennsylvania Supreme Court Committee on Racial and Gender Bias In the Justice System*, Chapter 6: Racial and Ethnic Disparities In the Imposition Of the Death Penalty (2003); R. Paternoster et al,

cases in which Mexican nationals have been subjected to discriminatory treatment. At times, authorities are overtly hostile to Mexican nationals, many of whom are poor laborers who have immigrated illegally to the United States in search of work. In some communities, Mexican nationals are described as "wetbacks," "illegal aliens," and other disparaging terms. As one commentary has observed,

> Mexican immigrants come to the United States to face grossly incorrect perceptions, negative stereotypes, both malignant and benign prejudices, hostility, and antipathy.[19]

41. These attitudes, not surprisingly, can affect the authorities' decisions to seek the death penalty against a Mexican national, as well as the jury's willingness to impose it.[20]

An Empirical Analysis of Maryland's Death Sentencing System with Respect to the Influence of Race and Legal Jurisdiction (2003); U.S. General Accounting Office, *Report to Senate and House Committees on the Judiciary: Death Penalty Sentencing* 5 (Feb. 1990); Baldus, Woodworth, Zuckerman, Weiner, & Broffitt, Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, With Recent Findings from Philadelphia, 83 *Cornell Law Review* (1998) at p. 1661; D. Baldus, et al., Reflections on the "Inevitability" of Racial Discrimination in Capital Sentencing and the "Impossibility" of Its Prevention, Detection, and Correction, 51 *Washington & Lee Law Review* (1994) at p. 365; S. Gross & R. Mauro, *Death & Discrimination: Racial Disparities in Capital Sentencing* 151 (1989); D. Baldus & G. Woodworth, *Race Discrimination in America's Capital Punishment System Since Furman v. Georgia (1972): The Evidence of Race Disparities and the Record of Our Courts and Legislatures in Addressing This Issue* (1997) (report prepared for the American Bar Association); T. Keil & G. Vito, Race and the Death Penalty in Kentucky Murder Trials: 1976-1991, 20 *American Journal of Criminal Justice* (1995) at p. 17; J. Jackson, *Legal Lynching: Racism, Injustice and the Death Penalty* (1996).

[19] J. Palerm, B.R. Vincent, and K. Vincent, "Mexican Immigrants in Courts," in Joanne Moore, ed., *Immigrants in Courts* (1999) at p. 96.

[20] *See* J. G. Connell, III and Rene L. Valladares, *Cultural Issues in Criminal Defense* (2003) at xxiii-iv [hereinafter Connell and Valladares](describing jury deliberations in which many jurors made ethnically biased comments regarding the defendant, such as "If a Mexican has a gun, he must be guilty.")

42. Mexican consular officers are keenly aware of the overt and subtle ways in which Mexican nationals can be treated differently, based upon their nationality. Through their vigilant presence in courtrooms, jails, and lawyers' offices, they can detect the presence of unfair bias, and take steps to expose it. In a capital murder prosecution, Mexican consular officers would raise such concerns with the appropriate authorities, and if need be, with the court.[21]

43. But where consular officers are absent, the defense lawyer is ineffective, and the Mexican defendant is isolated, there is often no effective way to prevent discrimination from tainting the fairness of the proceedings. Unfortunately, there are many examples of this phenomenon. The case of Mexican national Jose Trinidad Loza, convicted and sentenced to death in the state of Ohio, is illustrative.[22] The lead police detective in Mr. Loza's case has admitted that he referred to Mr. Loza as a "wetback" – an exceedingly derogatory ethnic slur used to describe recent Mexican immigrants – throughout his investigation. This same officer made the decision to seek the death penalty against Mr. Loza. Indeed, the prosecution of Mr. Loza was infused with racial animus and police misconduct. In addition to the lead detective, other law enforcement officers involved in the investigation admitted that they used the term "wetback" with some regularity. Some officers agreed the term was inappropriate and could compromise an investigation, but others saw nothing wrong with it or were uncertain about the propriety of using such a term.[23]

44. Mr. Loza was never informed of his rights to consular notification and assistance by the competent authorities. Had Mexican consular officers been notified of Mr. Loza's detention, they would have

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[21] *See* Declaration of Roberto Rodríguez Hernández, para. 9, Annex 7.

[22] Case No. 52 in Mexico's Application. *See* Declaration of Roberto Rodríguez Hernández, Appendix A, paras. 334-350 (detailing case) , Annex 7.

[23] *See* Declaration of Roberto Rodríguez Hernández, Appendix A, para. 336 (*citing* Gingerich Deposition at 13, 27 (okay if said "jokingly among the guys"), at 14 (term is neither racially insensitive or derogatory), Sulfstead Deposition at 24 (did not know if use of term was racially insensitive or derogatory)), Annex 7.

been sensitive to the ethnic bias that pervaded the Middleton, Ohio police department, and would have educated trial counsel regarding the derogatory use of the term "wetback." Consular officers would also have brought the matter to the attention of the prosecutor and/or the trial court in an effort to ensure fair treatment for Mr. Loza.

45. In certain cases, Mexico has observed that Mexican nationals are singled out for the death penalty, when other, equally culpable defendants receive lesser sentences. For example, Juan Caballero Hernández, who was sentenced to death in the state of Illinois,[24] was the only Mexican national among four co-defendants, was 18 at the time of the crime, and had no record of violence. He received a death sentence, but a co-defendant who had an appalling criminal history, and was accused of instigating and committing two of the murders, received a life sentence.

46. In other cases, prosecutors have encouraged jurors to sentence a Mexican national to death, based in part on the defendant's immigration status. In the case of Hector García Torres,[25] for example, the prosecution emphasized Mr. García Torres's status as an undocumented alien as one of the justifications for the imposition of a death sentence.[26] Defense counsel failed to object to the prosecution's irrelevant and inflammatory references to Mr. Garcia Torres's immigration status, and Mr. García Torres was sentenced to death.[27]

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[24] Case No. 45 in Mexico's Application.

[25] Case No. 31 in Mexico's Application.

[26] *See* Declaration of Roberto Rodríguez Hernández, Appendix A, para. 186, Annex 7.

[27] Prosecutors used similar tactics in the case of Ricardo Aldape Guerra, a Mexican national (not included in Mexico's Application) who was wrongly convicted of capital murder and spent 15 years on death row before he was exonerated. There, prosecutors encouraged jurors to find Mr. Aldape Guerra posed a danger to society, because he had entered the United States without proper documentation. Following Mr. Aldape Guerra's sentencing proceeding, the Ku Klux Klan demonstrated outside the courtroom, carrying signs saying "Houston will not tolerate illegal alien crimes." The evidence of discrimination in Mr. Aldape Guerra's trial was raised on appeal in *amicus curiae* briefs filed

47. Naturally, the examples cited above are not exhaustive. And foreign nationals in general, as well as Mexican nationals in particular, are vulnerable to disparate treatment.

48. When they have learned of a national's incarceration well before trial, Mexican consular officers have been able to bring evidence of disparate treatment to the attention of the court, with positive results. One example is the case of Mexican national Felipe Petrona Cabañas,[28] who was charged with the murder of a police officer in Arizona. Although he was only seventeen at the time of the offense, prosecutors sought the death penalty. At the time of his arrest, numerous media reports highlighted his unlawful immigration status. Moreover, Mexico discovered that Arizona had only executed two juvenile offenders in 120 years, and both were of Mexican heritage.[29] Armed with these disturbing facts, Mexico submitted an *amicus curiae* brief to the trial court, arguing that Mr. Petrona Cabañas should not be sentenced to death. The court subsequently sentenced him to life imprisonment.

2. Mexican Consular Officers Serve as a "Cultural Bridge" For Their Detained Nationals.

49. The United States State Department has described the right of access to a consular officer as an invaluable "cultural bridge," which "[n]o one needs...more than the individual...who has been arrested in a

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by Mexico, as well as several non-governmental organizations. A federal district court eventually granted relief and vacated Mr. Aldape Guerra's conviction, concluding that the police and prosecutors in the case had intimidated Mexican witnesses and engaged in other forms of misconduct that tainted the fairness of the proceedings. *See Guerra v. Collins*, 916 F.Supp. 620 (S.D. Tex. 1995).

[28] Mr. Petrona Cabañas is not included in Mexico's Application.

[29] One of the juvenile offenders currently sentenced to death in Arizona is also Mexican – Martin Raul Fong Soto, who is Case No. 48 in Mexico's Application. In addition, as of this writing, the state of Arizona is seeking the death penalty against yet another Mexican national who was only 16 years old at the time of the offense.

foreign country."[30] Arrested foreign nationals in the United States are often isolated from family and friends, speak English as a second language or not at all, and fail to understand their rights under the U.S. criminal justice system.[31] They may also suffer from unwarranted fears about the consequences of asserting their legal rights, such as the fear of deportation.[32]

50. In order to make informed and critical decisions about his case, a foreign national must understand the basic elements of the criminal law of the detaining state.[33] As the Government of Canada has observed:

> [The typical detained foreign national,] who is not relatively sophisticated, or who lacks strong connections in the arresting community, is especially vulnerable to making dangerously uninformed choices in exercising even the rights of which the arresting authorities do inform him. He is therefore almost certain to be unable to avail himself of rights of which the arresting authorities fail to inform him. Finally, with no one to explain his predicament in the context of the more familiar system of his home country, a detained foreign national is at a considerable disadvantage in establishing a defense.[34]

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[30] *See* U.S. Dep't of State, 7 *Foreign Affairs Manual* 400, 401 *at* <http://foia.state.gov/FAMDir/masterdocs/07fam/07m0410.pdf>.

[31] *See* J. Palerm, et al., *supra*, at p. 73 ("In addition to problems of language, Mexican immigrants are likely to know nothing about the proceedings: who is in charge, what the roles of the various persons are, and what is happening.")

[32] *See, e.g., id.* at 95 (Mexican immigrants may abandon legal rights because they fear exposure of their own or family members' illegal status); *United States v. Beraun-Panez*, 812 F.2d 578, 580-81 (9th Cir. 1987) (police officers took advantage of the defendant's insecurities about his alien status by mentioning the possibility that he would be deported and separated from his family).

[33] *See* Lee, *supra*, at 166.

[34] *See Brief Amicus Curiae of the Government of Canada in Support of an Application for the Writ of Habeas Corpus in the Case of Ex Parte Joseph Stanley Faulder*, at 10, Annex 30.

51. Unlike other local participants in a state's criminal system, consular officers located in the detaining state are uniquely situated to translate the often complex and unfamiliar legal concepts into terms the foreign national can readily understand.

52. As the Foreign Affairs Manuel of the U.S. Department of State acknowledges:

> Legal systems vary greatly. . . . U.S. citizens arrested abroad often have an imperfect understanding of American criminal procedure and may have absolutely no understanding of the legal procedures of the country in which they are detained. Thus, it is essential that each mission (or where variations in local conditions warrant, each constituent post) prepare informational material for delivery to each arrested U.S. citizen regarding the judicial process the arrestee is likely to face. Posts should prepare a packet of information covering initial arrest, remand procedure, trial procedure, appeal process, and penal conditions and rules.
>
> The purpose of this material is not to usurp the function of legal counsel or encourage a "do it yourself" approach. Rather, it serves the purpose of helping arrestees understand what is happening to them and provides a yardstick against which they can measure an attorney's performance.[35]

53. Mexican consular officers are specifically trained in United States law to provide information that could prevent a detained national from waiving important legal rights and from making poor decisions with adverse legal consequences.[36] By taking the time to explain

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[35] *See* U.S. Dep't of State, 7 *Foreign Affairs Manual* 407 *at* <http://foia.state.gov/FAMDir/masterdocs/07fam/07m0410.pdf>; see, *e.g.*, Judge P. J. DeMuniz, "Introduction," in Joanne Moore, ed., *Immigrants in Courts* (1999) at p. 3 (describing case of wrongly convicted Mexican national who was Mixtec Indian, and who didn't speak Spanish or English proficiently, yet was only provided a Spanish interpreter at trial); Declaration of Dueñas Gonzalez, paras. 35-36, Annex 4.

[36] *See* Declaration of Roberto Rodríguez Hernández, para. 5, Annex 7.

thoroughly the applicable procedural rules, the roles of various actors in the criminal prosecutions, and the rights guaranteed the national at each phase of the proceedings, consular officers can overcome the national's culturally-rooted misconceptions of the criminal justice system.

54. Such services are vital for recent Mexican immigrants, as well as those who have lived in the United States for several years. Mexican nationals often remain deeply immersed in Mexican culture after their immigration to the United States.[37] Some never learn English, even after living in the United States for decades. Moreover, Mexican nationals facing the death penalty suffer the multiple impediments of foreign culture, poverty, and extremely limited education. The average Mexican national on death row has completed less than seven years of school. Seven of the Mexican nationals on death row have gone to school for less than three years.[38] Many others suffer from cognitive impairments stemming from mental retardation, brain damage, and mental illness.[39]

55. The consular officer's role as a "cultural bridge" is particularly important in relation to four aspects of a capital murder prosecution: interrogation, plea bargaining, the role of the defense attorney, and the establishment of a defense.

a. Vulnerability to Interrogation

56. Consular assistance is invaluable in order to compensate for the well-documented susceptibility of a detained foreign national to a misunderstanding of his rights during interrogation.[40] Language barriers,

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[37] *See* Declaration of Dueñas Gonzalez, paras. 9-10, Annex 4.

[38] Hector García Torres, Ramiro Ibarra Rubí, Virgilio Maldonado, Abelino Manríquez Jaquez, Juan Ramón Sanchez Ramírez, Ramiro Hernández Llanas, and Rafael Camargo Ojeda.

[39] *See* Declaration of Ambassador Roberto Rodríguez Hernández, para. 6, Annex 7.

[40] *See, e.g.*, Amnesty International, *Saudi Arabia - Alone, afraid and abused*, AI Index: MDE 23/08/00, *available at* <http://www.amnesty.org/ailib/intcam/ saudi/issues/migrant.html> (last visited April 15, 2003) ("[Arrested foreign nationals in Saudi Arabia] may be deceived or coerced into signing a confession in Arabic, a language they may not

as well as the detained foreign national's unfamiliarity with the legal process, leave him particularly vulnerable to deception or coercion by standard police interrogation techniques into waiving his rights and confessing falsely.[41] Moreover, because an indigent Mexican national will not receive an attorney to advise him during interrogation, unless he specifically requests one,[42] consular officers are in a unique position to

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understand."); Amnesty International, *Japan: Ill-Treatment of Foreigners in Detention*, AI Index: ASA 22/09/97, page 1, November 1997, *available at* <http://web.amnesty.org/library/index/engasa220091997> (last visited June 10, 2003) ("[Arrested foreign nationals in Japan] have been beaten, denied access to interpreters and lawyers [and] forced to sign statements in languages they did not understand..."); Human Rights Watch, *Presumption of Guilt: Human Rights Abuses of Post-September 11 Detainees*, Vol. 14 No. 4(G) August 2002, pp. 33-46, available at <http://www.hrw.org/reports/2002/us911/USA0802.pdf> (last visited June 10, 2003) (noting that some foreign nationals detained in the United States were informed of their rights only *after* lengthy interrogation, while others waived those rights by signing documents that they did not understand); *United States v. Short*, 720 F.2d 464, 469 (6th Cir. 1986) (noting that German defendant, whose English was limited, "apparently had no knowledge of the American criminal justice system" and had not knowingly and voluntarily waived her legal rights at the time of interrogation).

[41] This is precisely what happened in the case of Mexican national Omar Aguirre, who was wrongly convicted of murder and sentenced to fifty-five years in prison. In 1997, Mr. Aguirre was charged with the torture and murder of a Chicago store owner. He was interrogated and beaten over the course of three days. He spoke little English and believed the confession he eventually signed, which was in English, was a release for him to go home. In December 2002, federal prosecutors released Mr. Aguirre, who was entirely innocent of any wrongdoing. *See* David Heinzmann and Jeff Coen, *Jailed by Lies, Freed by Truth*, Chicago Tribune, December 22, 2002.

[42] Under *Davis v. United States*, an attorney will only be provided to an indigent detainee during interrogation if he clearly requests one. *See* 512 U.S. 452, 459 (1994). As some commentators have noted, "this rule disadvantages those who are unfamiliar with the American legal system or those whose first language is not English because they may not know how to communicate an unequivocal request." Connell and Valladares, *supra*, §4.5(b); *see also Davis* at 460 (Kennedy, J., *dissenting*) (recognizing that the *Davis* rule will disadvantage defendants with a "lack of linguistic skills").

advise and assist nationals facing police interrogation, before the appointment of an attorney.[43]

57. Mexican consular officers have repeatedly observed that Mexican nationals, many of whom are poor, uneducated laborers who speak little English,[44] will sign confessions written in English, without understanding what they are signing.[45] In the case of Mexican national Gabriel Solache Romero, for example, police officers in Chicago, Illinois interrogated him without notifying him of his Article 36 rights.[46] Mr. Solache did not speak English at the time of his arrest, but signed a confession written in English after undergoing forty hours of interrogation without an interpreter and during which he was physically abused. His confession was subsequently introduced as the primary piece of evidence against him at his trial.[47]

58. When Mexican consular officers are promptly notified of a suspect's detention, they can alleviate these misunderstandings, and can

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[43] Although the Sixth Amendment to the United States Constitution guarantees defendants a right to an attorney, that right typically does not attach until the national makes his first appearance in court. *See McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991) (*quoting United States v. Gouveia*, 467 U.S. 180, 188 (1984)) ("[The right to counsel attaches] at or after the initiation of adversary judicial criminal proceedings--whether by way of formal charge, preliminary hearing, indictment, information or arra ignment.") .

[44] "Compared to other immigrant groups, Mexican immigrants are distinguished by being young and having low educational levels, high labor participation, low family and per-capita income, and large household sizes. Mexican male immigrants are on average 17 years old, and Mexican females, 23 years old. . . More than 60 percent of the adult Mexican-immigrant population have no more than an elementary education." J. Palerm, et al., *supra*, at p. 73.

[45] *See* Declaration of Dueñas Gonzalez, paras. 35-36, Annex 4.

[46] Case No. 47 in Mexico's Application.

[47] Declaration of Roberto Rodríguez Hernández, Appendix A, para 299-312, Annex 7.

deter police abuse of detainees[48]—a point the United States conceded long ago.[49] Had Mexican consular officers been immediately notified of Mr. Solache's detention, they would have advised Mr. Solache of the implications of signing a confession under U.S. law. They would also have advised him—and the proper authorities—of the need for an official interpreter to translate Mr. Solache's statements during his interactions with the authorities.[50]

59. Consular officers can also advise their nationals on the critical differences between U.S. law and Mexican law regarding statements to law enforcement authorities. Under Mexican criminal law, a confession obtained from a criminal defendant is admissible against that defendant at trial only if the confession was taken before the prosecutor ("Ministerio Publico") or judge and in the presence of counsel or "person of confidence" to the defendant.[51] Unlike in the United States, statements given to the police during an interrogation conducted outside the presence of defense counsel cannot be used against the defendant at trial.[52] Further, unlike in the United States, Mexican law greatly reduces

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[48] *See* S. A. Shank & J. Quigley, *supra,* at 719, 720-21 ("A foreigner may also be particularly vulnerable to deception used by police detectives as a standard interrogation technique...If properly implemented, the right of consular access can significantly compensate for the difficulties confronting an accused foreigner."). *See also* Declaration of Michael Iaria, para. 9, Annex 6.

[49] *See* U.S. Citizens Imprisoned in Mexico: Hearings before the Subcommittee on International Political and Military Affairs of the House Committee on International Relations, 94th Cong., 2nd Sess. (1976), at 58 (Statement of Hon. Leonard F. Walentynowicz, Administrator, Bureau of Security and Consular Affairs, Department of State) ("Immediate consular access, in [the Department of State's] opinion, still remains the restraining factor preventing abusive treatment [in prison]"), and at 6 (Statement of Hon. William H. Luers, Deputy Assistant Secretary, Bureau of Inter-American Affairs, U.S. Department of State) ("immediate consular access" offers the best hope of effective deterrence of abuse during the interrogation").

[50] *See id.*

[51] *See* Declaration of Adrián Franco, para 8, Annex 3.

[52] *See id.*

the reliance on a confession in the trial and conviction of a defendant by minimizing its evidentiary value.[53]

60. Mexican nationals, particularly if they have had no prior contact with the United States' criminal justice system, are unlikely to understand this distinction – even when advised by the police of their *Miranda* rights.[54] Mexican national Arturo Juárez Suárez,[55] through his Spanish interpreter, told police during his interrogation that he "doesn't understand anything about the [U.S.] justice system."[56] Likewise, Felix Rocha Diaz, who spoke no English and had a fourth-grade education, testified at a pre-trial hearing that he did not understand that he had the right to have an attorney present during his interrogation, nor did he understand the meaning or implication of "waiving" his legal rights.[57] Both Mr. Juárez Suárez and Mr. Rocha Diaz gave incriminating statements to the authorities.[58] In Mr. Rocha Diaz's case, his statement was virtually the only evidence that connected him to the crime.[59] As is their practice in all cases, had consular officers been notified of their detention immediately upon arrest, they would have advised both men not to speak to the police without first seeking the advice of a lawyer,

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[53] *See id.*

[54] *See* Declaration of Dueñas Gonzalez at paras. 24-34, Annex 4. In *Miranda v. Arizona*, the United States Supreme Court indicated that a defendant must be informed of certain constitutional rights prior to interrogation. The Court provided, however, that a defendant "may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly, and intelligently." 384 U.S. 436, 444 (1966).

[55] Case No. 10 in Mexico's Application.

[56] *See* Declaration of Roberto Rodríguez Hernández, Appendix A, para. 54, n. 45, Annex 7.

[57] *See* Declaration of Roberto Rodríguez Hernández, Appendix A, para. 265, Annex 7.

[58] *See id.*, paras. 53, 266.

[59] *See id.*, para. 270.

informed them about the implications of a confession under U.S. law, and insisted on the provision of a neutral, qualified interpreter.

b. Plea Bargaining

61. In the United States, a "plea bargain" is an offer to a defendant by a prosecutor of a reduced sentence in exchange for the defendant's plea of guilty. The resolution of criminal cases through the plea bargaining process is very common in the United States.[60] The American Bar Association has recognized that in a capital case, one of defense counsel's primary obligations is vigorously to pursue such a negotiated settlement, since it is one of the most important means of protecting a defendant from the imposition of the death penalty.[61] As described below, Mexican consular officers can provide critical assistance in this process.

62. In many U.S. jurisdictions, the prosecution will accept a formal proffer of evidence in support of mitigation of a possible sentence before deciding whether to seek the death penalty.[62] The strength of this

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[60] S. Gross, Lost Lives: Miscarriages of Justice in Capital Cases, 6 *Law & Contemporary Problems* (Autumn 1998) at p. 142 ("eighty to nearly ninety percent of convictions result from guilty pleas."). The vast majority of criminal prosecutions in the United States are resolved without trials. As Mr. Gross observes, most criminal cases are resolved pre-trial, "by the exercise of prosecutorial discretion to dismiss, reduce charges, or recommend or agree to a particular sentence." *Id.* (citations omitted). *See also Santobello v. New York,* 404 U.S. 257, 260 (1971) (U.S. Supreme Court called the practice of plea bargaining "an essential component of the administration of justice" in the U.S.).

[61] *See generally* American Bar Association, Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Guideline 10.9.1 (revised edition, 2003) , Annex 66. As one of the most prominent capital litigators in the United States has observed, "[d]eath is different because avoiding execution is, in many capital cases, the best and only realistic result possible." K. McNally, *Death is Different: Your Approach to a Capital Case Must be Different, Too,* The Champion, Mar. 1984, at 8, 15. As a result, plea bargains must be aggressively sought by defense counsel in all capital prosecutions. *Id.*

[62] *See* ABA Guidelines, Guideline 10.9.1 (Commentary) , Annex 66.

presentation, along with other factors, can play a substantial role in persuading the prosecution to waive the death penalty.[63] In some jurisdictions, this decision may not be conditioned on the defendant's acceptance of guilt, but in many states, the prosecution will only agree to waive the death penalty if the defendant pleads guilty to murder and accepts a lengthy term of imprisonment.[64]

63. Consular officers play two critical functions in the delicate, often protracted negotiations that lead to a plea bargain. *First*, consular officers meet with prosecutors, or present written submissions, that contain crucial mitigating evidence. Often, consular officers will have gathered this evidence themselves, in Mexico, after learning of the defendant's detention. The consulate commonly searches all archives and databases in Mexico to determine whether the defendant has a prior criminal record, and provides documentation of that search to defense counsel. Other times, consular officers will obtain school and hospital records that provide proof of a defendant's mental or physical condition.[65] Sometimes, consular officers can explain cultural factors that mitigate the defendant's culpability.[66]

64. Through these efforts, Mexican consular officers have played a vital role in persuading prosecutors to waive the death penalty in at least thirty-eight cases in the last three years alone.[67]

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[63] *See id; see also* W. S. White, Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care, 1993 *University of Illinois Law Review* (1993) at pp. 328-29.

[64] *See* ABA Guidelines, Guideline 10.9.1 (Commentary) , Annex 66.

[65] *See* Declaration of Roberto Rodríguez Hernández, para. 11, Annex 7.

[66] *See* A.D. Renteln, *Raising Cultural Defenses,* in Connell and Valladares, *supra*, at 7-20 (describing case of Mexican national who killed a man in response to a deeply offensive insult, and explaining how his culture influenced his response).

[67] Declaration of Roberto Rodríguez Hernández, para. 31, Annex 7. *See also* Declaration of Michael Iaria, para. 6 (describing the case of Mexican national Nicolas Solorio Vasquez) , Annex 6; L. Lafay, *Virginia Ignores Outcry*, The

65. *Second*, consular officers assist in explaining the plea bargaining process to the defendant. It is critical that defendants understand this concept, since it may provide the only means by which they can avoid possible execution.[68] Mexican law, however, does not allow for plea bargaining for serious felonies.[69] Consequently, Mexican nationals unfamiliar with the plea bargaining process may not understand the benefits that derive from this practice. Defense counsel's efforts to explain the process are often unavailing, since Mexican nationals frequently mistrust court-appointed attorneys provided by the government that is seeking to incarcerate them.[70]

66. Mexican nationals may also fail to comprehend that *unless* there is a specific agreement to provide leniency, their plea of guilty will not guarantee a lesser punishment. For example, in at least two of the cases listed in Mexico's Application, nationals entered guilty pleas without any negotiated settlement.[71] In neither case did the defendant obtain any concession from the prosecution in exchange for his guilty plea. Both received the death penalty.

67. In several cases, Mexican consular officers have played an instrumental role in explaining the advantage of accepting a plea bargain. One example is the case of Francisco Gonzalez Reyes, who was accused of a triple homicide in the state of Florida. In early 2002, the prosecution

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Roanoke Times, 6 July 1997, at C1 (noting that Mexican consulate negotiated plea bargains on behalf of two Mexican citizens facing the death penalty).

[68] *See, e.g.*, Declaration of Michael Iaria, para. 7, Annex 6.

[69] *See* Declaration of Adrián Franco, para. 7, Annex 3.

[70] *See* J. Palerm, et al., *supra*, at p. 93 ("If there is a high risk involved in the situation, Mexican immigrants may refuse to divulge information to anyone in authority – attorney, judge, or counselor.").

[71] Daniel Angel Plata and Carlos Rene Pérez Gutiérrez (cases No. 40 and No. 51 in Mexico's Application, respectively). Mr. Pérez Gutierrez entered a so-called "Alford" plea, under which he technically admitted no guilt; the practical effect, however, is exactly the same as a guilty plea. The defendant is convicted, and deemed to be guilty of the crime. *See North Carolina v. Alford*, 400 U.S. 25 (1970) (allowing plea of guilty even where defendant maintains innocence).

offered Mr. Gonzalez Reyes the option of pleading guilty, and receiving three life sentences. The evidence of his guilt was overwhelming. Mr. Gonzalez Reyes, however, would not accept the offer.

68. None of the doctors who had evaluated Mr. Gonzalez Reyes, either for the defense or the prosecution, spoke Spanish. The court would not authorize funds for an out-of-state expert, so Mexico retained Dr. Antonio Puente, a bilingual neuropsychologist to evaluate Mr. Gonzalez Reyes' mental status. According to defense counsel, Dr. Puente "quickly built a rapport with Francisco," and as a result, Mr. Gonzalez Reyes was more forthcoming in providing information relating to his mental health. The expert concluded that Mr. Gonzalez Reyes was mentally retarded.

69. Armed with this knowledge, consular officers took extra care in explaining his legal rights. In addition, the consulate explained the situation to Mr. Gonzalez Reyes' family, who also spoke to the defendant and encouraged him to accept the offer. Finally, on 23 January 2003, Mr. Gonzalez Reyes accepted the prosecution's offer, and was sentenced to life imprisonment.[72]

c. Providing a Bridge to Defense Counsel

70. Typically, poor Mexican nationals distrust individuals in a position of authority, and lack faith in the ability of the legal system to protect them.[73] Their distrust frequently extends to their own defense

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[72] In addition, if defense attorneys do not speak Spanish, they may not spend enough time explaining key concepts to their Mexican national clients. This is particularly important when the prosecution offers to resolve the case through a plea bargain. The intervention of a Spanish-speaking consular officer or attorney, in these cases, is often critical in helping the national understand his rights. For instance, Mexican national Carlos Jahuey Carillo, who was facing the death penalty in Arizona, was offered a plea bargain by prosecutors that called for life imprisonment in lieu of the death penalty. He repeatedly rejected the offer, until Mexico retained a Spanish-speaking lawyer to explain the terms and conditions of the agreement, as well as the consequences of rejecting the agreement. On 18 December 2002, he accepted the prosecution's offer, and was sentenced to life imprisonment.

[73] *See* Declaration of Adrián Franco, para. 5, Annex 3; *see generally* J.Palerm, et al, *supra*, at p. 92. These attitudes are prevalent among other foreign nationals in the legal system, as well. *See* J. Bauer, *Speaking of Culture: Immigrants in*

lawyers, whom they view as being part of the legal system.[74] Consular intervention is critical to explain the role of defense counsel, and encourage meaningful and open communication between lawyers and their Mexican national clients.

71. It is not uncommon for Mexican nationals to develop a relationship of trust with consular officers that simply does not extend to their defense attorneys. Consular officers speak their language, understand Mexican slang, and offer the solidarity of a fellow countryman. Consular officers can also detect symptoms of cognitive impairments that often go undetected by lawyers who do not speak Spanish, and cannot hear the verbal cues of mental illness. Some attorneys attribute odd behavior to cultural differences, when in reality, it is a sign of mental illness or mental retardation.[75]

3. Mexican Consular Officers Enhance the Quality of Legal Representation At Trial

a. Monitoring Trial Counsel

72. It is certainly no exaggeration to observe that the single most important factor in determining whether a capital defendant lives or dies is the quality of his trial attorney. As the American Bar Association has explained,

> The quality of counsel's "guiding hand" in modern capital cases is crucial to ensuring a reliable determination of guilt and the imposition of an appropriate sentence. Today, it is universally accepted that the responsibilities of defense counsel are uniquely demanding, both in the highly specialized legal

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the American Legal System, in Joanne Moore, ed., Immigrants in Courts (1999), at p. 18; Connell and Valladares, *supra*, at 1-7 (describing El Salvadoran witness' tendency to defer to prosecutor's questions by answering "*no recuerdo*" (I don't remember) when she actually meant "no").

[74] *See* J. Palerm, et al., *supra*, at p. 92.

[75] *See* Declaration of Roberto Rodríguez Hernández, para. 7, Annex 7.

> knowledge that counsel must possess and in the advocacy skills he or she must master. At every stage of a capital case, counsel must be aware of specialized and frequently changing legal principles and rules.[76]

73. Yet it is by now commonplace in the United States that indigent defendants are represented by untrained, unqualified, or under-funded attorneys. As one leading expert on capital punishment has observed, it is often:

> abysmally ineffectual lawyers - chronically under-remunerated; often young and inexperienced, patently unqualified and incompetent, unethical, or bar-disciplined; sometimes drug-impaired, drunken, comatose, psychotic, or senile; very often grossly negligent; and nearly always out-gunned --who represent capital defendants in most death penalty states around the country.[77]

74. It has been persuasively shown that in important respects "this counsel situation is worse in capital than in noncapital cases" in the United States.[78] United States Supreme Court Justice Ruth Bader Ginsburg has been quoted as stating flatly: "People who are well represented at trial do not get the death penalty," and "I have yet to see a death case among the dozens coming to the Supreme Court on eve-of-execution stay applications in which the defendant was well-represented at trial."[79]

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[76] ABA Guidelines, Guideline 1.1 (Commentary) , Annex 66.

[77] J. Liebman, The Overproduction of Death, 100 *Columbia Law Review* (2000) pp. 2102-06; *see also Alabama v. Shelton*, 122 S. Ct. 1764, 1772 (2002), *quoting United States v. Cronic*, 466 U.S. 648, 656 (1984) (indigent counsel often fail to subject the government's case to "the crucible of meaningful adversarial testing").

[78] Liebman, *supra*, at pp. 2102-06.

[79] Anne Gearan, *Supreme Court Justice Supports Death Penalty Moratorium*, ASSOCIATED PRESS, 9 April 2001.

75. Mexican consular officers are specifically trained to monitor and support defense counsel's efforts, attend court proceedings, and confer regularly with the defendant and his family.[80] Some attorneys – particularly if they are not Spanish-speaking – will not take the time to visit their clients.[81] In these cases, consular officers – or the attorneys working with the Government of Mexico – are literally the only people communicating with detained Mexican nationals. Here, too, Mexico's involvement in a case can make the difference between life and death.[82]

76. Sometimes, defense attorneys are competent, but lack experience representing Mexican nationals. In these cases, consular officers will provide guidance on cultural factors, provide names of bilingual experts, and assist in investigating the national's life in Mexico.[83]

77. Other defense counsel are simply incompetent, as in the case of Mr. Carlos Avena Guillen.[84] In these cases, Mexican consular officers

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[80] *See* Declaration of Roberto Rodríguez Hernández, para. 6, Annex 7.

[81] Two of the Mexican nationals listed in this Application, Daniel Angel Plata (No. 40) and Ramiro Ibarra Rubí (No. 35), never met the lawyers who represented them during their state post-conviction appeals. Clearly, a lawyer who never meets his client is unable reliably to determine whether the client suffers from mental disabilities, regardless of cultural barriers. *See id.*, para 8.

[82] The case of Ernesto Baylon Mendoza is illustrative. Mr. Baylon Mendoza was charged with capital murder in rural Texas. Mexican consular officers enlisted the assistance of a Spanish-speaking attorney to interview Mr. Baylon Mendoza. After interviewing him, the attorney determined that Mr. Baylon Mendoza was a juvenile at the time of the crime. Mexican consular officers subsequently obtained his birth certificate for defense counsel. Defense counsel had been representing Mr. Baylon Mendoza for six months, but was not even aware that his client was only seventeen at the time of the crime. Counsel showed Mr. Baylon Mendoza's Mexican birth certificate to the prosecution, which promptly agreed to waive the death penalty. *See* Declaration of Roberto Rodríguez Hernández, para. 33, Annex 7.

[83] *Id.*, paras. 6-8.

[84] *See* discussion of Mr. Avena Guillen's case infra, Chapter III.B.3.

do not hesitate to (1) persuade the court to discharge court-appointed counsel and provide new counsel; (2) recruit *pro bono* counsel; or (3) retain counsel to represent the defendant.[85] By enhancing the quality of legal representation, consular assistance is vital to an adequate defense.[86]

78. For example, in the case of Nicolas Solorio Vasquez, a Mexican national charged with capital murder in the state of Washington,[87] the court initially appointed a patently unqualified lawyer to represent him.[88] Mexican consular officers objected to his appointment, and requested that the court appoint a more qualified attorney. In response to Mexico's objections, the lawyer withdrew from the case, and another lawyer was appointed. The new lawyer was

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[85] *Id.*, para. 9.

[86] *See, e.g.*, Report to the UN Commission on Human Rights (document E/CN.4/1998/68/Add.3), Findings of the Special Rapporteur, 117-121 ("[N]ot informing the [foreign national] defendant of the right to contact his/her consulate for assistance may curtail the right to an adequate defence[.]"). The case of Liliana Piña, a Mexican national charged with murder in rural Arkansas, is illustrative. While Ms. Piña was initially represented by an experienced capital litigator, he was subsequently removed from the case and did not get another lawyer for several weeks. She remained in the jail, isolated and depressed, and her mental condition began to deteriorate. When a consular officer observed Ms. Piña's mental decline and learned that she was without legal representation, the consular officer contacted jail officials, the district attorney's office, and expert legal counsel with the Mexican Capital Legal Assistance Program. Counsel located an experienced capital litigator in Arkansas, and then persuaded a judge to appoint him to represent Ms. Piña. Ms. Piña was immediately removed from the jail and transferred to a psychiatric facility. Mexico then provided funds for both a bilingual neuropsychologist, and referred defense counsel to a bilingual psychiatrist, both of whom evaluated Ms. Piña. The psychiatrist concluded she was incompetent to stand trial, was insane at the time of the crime, and did not understand her legal rights at the time of her interrogation. Faced with this new information, as well as a competent and aggressive defense lawyer, the prosecutor offered to waive the death penalty, and Ms. Piña pleaded guilty to a lesser charge. *See* Declaration of Roberto Rodríguez Hernández, para. 33, Annex 7.

[87] Mr. Solorio Vasquez's case is not included in Mexico's Application.

[88] *See* Declaration of Michael Iaria, para. 5, Annex 6.

ultimately successful in persuading the prosecution to waive the death penalty, even though the case was highly aggravated.[89]

b. Gathering Evidence

Mexican consular officers also assist in gathering evidence for trial. Most often this takes the form of locating records and witnesses in Mexico.[90] Where necessary, however, the consulate also provides funds for the retention of experts and criminal investigators to aid in the presentation of an effective defense on behalf of the national.[91] For instance, in the case of Ernesto Esteban Ramirez Anguiano, charged with murder in Dallas, Texas, the Mexican consulate conducted such a thorough investigation of the crime that prosecutors dismissed the charges against him. In a letter written to the Texas Attorney General's office opposing Mexico's attempt to gather police reports on the case, the district attorney observed:

> I have also learned that the Consulado General de Mexico has provided investigators for the benefit of the defendant and the attorney representing him in the murder case. They have interviewed witnesses in the criminal case and provided translators. They have made the defendant's defense attorney aware of additional witnesses that were unknown to law enforcement officers, helped the defense attorney locate additional witnesses, interviewed those witnesses and even determined who has possession of the murder weapon that deputies were unable to locate at the scene of the crime. They are clearly acting on behalf of the defendant in the criminal case.[92]

79. On 8 May 2003, the prosecution announced that it would be dismissing all charges in the case.[93] Mr. Ramirez Anguiano's defense

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[89] *Id.*

[90] *See* Declaration of Roberto Rodríguez Hernández, paras. 11-13, Annex 7.

[91] *See* Declaration of Roberto Rodríguez Hernández, para. 11, Annex 7.

[92] *See* Declaration of Peter Lopez, paras. 7-8, Annex 2.

[93] *See id.* at para. 10.

counsel has stated that without Mexico's assistance, Mr. Ramirez Anguiano would likely still be facing murder charges.[94]

c. Preserving International Legal Issues

80. Mexican consular officers also assist defense counsel by educating them directly about Article 36 obligations and helping to raise the claim of a violation as early as possible.[95] This is particularly important with regard to the municipal law doctrine of procedural default, discussed *infra* in Chapters III.C and IV.B. The doctrine mandates that where trial counsel does not raise certain substantive rights at trial, those rights are lost to the national in all subsequent proceedings.[96] In the last three years alone, Mexico has provided information on Article 36, as well as sample briefs and other information on international law, in at least sixty-seven capital cases involving Mexican nationals. In this way, Mexico has succeeded in preserving crucial legal issues that can later be raised on appeal, even if the defendant is convicted and sentenced to death.[97]

4. Mexican Consular Officers Assist in Amassing Vital Mitigation Evidence.

81. In a capital case, it is imperative that defense counsel conduct a wide-ranging and intensive investigation of the defendant's background, mental condition, and life experiences to gather evidence that militates

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[94] *See id.* at para. 11.

[95] *See* Declaration of Roberto Rodríguez Hernández, para. 10, Annex 7.

[96] *See* discussion, *infra* Chapter IV.B.

[97] In other cases, Mexico has intervened to preserve a defendant's rights to appeal his conviction and death sentence, after incompetent defense attorneys missed crucial filing deadlines. Appellate review in capital cases is governed by strict filing deadlines. If those deadlines are not met, the courts will refuse to review a defendant's appeal. This happened in the case of Daniel Angel Plata, whose attorney missed a filing deadline by *five months*. Mexico retained counsel to file an *amicus* brief in the federal district court, and was able to persuade the court to permit Mr. Plata to file his appeal. *See* Declaration of Roberto Rodríguez Hernández, Appendix A, para. 250, Annex 7.

against the imposition of the death penalty. In the parlance of capital litigation, this "mitigating evidence" is presented not as a legal defense to the crime itself, but rather as an explanation for why the crime was committed. Mitigating evidence serves to humanize the defendant, both in the eyes of the prosecution and in the eyes of the jury, and is an essential component in the defense of every capital case.[98]

82. As described above, mitigating evidence is often presented to the prosecution prior to trial in an effort to persuade the prosecution to waive the death penalty. In addition, mitigating evidence is presented during the sentencing phase of a capital murder trial.[99] At the sentencing phase, mitigating evidence – often available only in the home state – provides the best and only hope of convincing the jury to spare the national's life.[100]

83. Without the assistance of the consulate, mitigation investigation on behalf of a Mexican national is extraordinarily difficult. As one of the United States' leading capital investigators has explained:

> In my experience, the process of compiling an accurate social history is even more time-consuming and delicate when interviewing clients and family members from foreign cultures, due to inevitable cultural misunderstandings about the nature of the legal process and the purpose of the investigation. Every aspect of the

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[98] *See* ABA Guidelines, Guideline 10.7 (Commentary), Annex 66.

[99] Capital prosecutions in the United States are bifurcated. In the first stage, the jury decides whether the Government has proven, beyond a reasonable doubt, that the defendant committed the charged offense. In the second stage, the jury must decide whether to sentence the defendant to be executed. *See* ABA Guidelines, Guideline 1.1 (Commentary), Annex 66.

[100] Often this evidence is presented through a myriad of bilingual and bicultural experts, including psychologists, psychiatrists, sociologists, social workers, and others. Consular officers frequently are more familiar with these experts than local defense counsel. In several cases, where the national has not been able to secure funding for these experts from the court, Mexico has provided the necessary funding. *See* Declaration of Roberto Rodríguez Hernández, para. 11, Annex 7.

> investigation is more difficult abroad, from gathering records to gaining the trust and cooperation of witnesses.[101]

84. Investigation in rural Mexico is costly, time-consuming, and logistically complicated. With the assistance of Mexican consular officers, however, attorneys obtain records, interview witnesses, identify and secure local guides to help locate witnesses, and ensure Mexican witnesses are provided transportation and visas to enter the United States.[102] Mr. Stetler observes:

> The degree of cooperation of the foreign government can have tremendous impact on the success or failure of the investigation. The foreign government can assist in securing the cooperation of local institutions in locating and copying historical records, it can provide access to ethnoculturally competent experts who can facilitate counsel's understanding of the client's world and worldview, and it can promote trust between client and counsel by helping the client understand the legal framework in which counsel is operating.[103]

85. In the last three years alone, Mexico has provided funds for experts, mitigation specialists, or investigators in *at least* twenty-two capital murder cases. In dozens of other cases, Mexico has gathered records and documents from Mexico. Mexico is confident that these efforts have saved the lives of Mexican nationals.

86. The importance of consular assistance in gathering mitigating evidence was recently recognized by the Oklahoma court of last resort in the case of Gerardo Valdez, a Mexican national sentenced to death in

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[101] *See* Declaration of Russell Stetler, para. 15, Annex 34.

[102] *See* Declaration of Peter Lopez, para. 4, Annex 2; Declaration Michael Iaria, para. 6, Annex 6; Declaration of Roberto Rodríguez Hernández, para. 13, Annex 7; *see also* S. Bright, Counsel for the Poor: The Death Sentence Not for the Worst Crime But for the Worst Lawyer, 103 *Yale Law Journal* (1994), at p. 1877.

[103] Declaration of Russell Stetler, para. 16, Annex 34.

that state in 1989. The court observed that Mr. Valdez had been represented at trial by a lawyer who had never before handled a capital case. He had no money to retain experts or investigators, and neglected to investigate Mr. Valdez's childhood in Mexico. The Oklahoma court held:

> We cannot ignore the significance and importance of the factual evidence discovered with the assistance of the Mexican Consulate. It is evident from the record before this Court that the Government of Mexico would have intervened in the case, assisted with Petitioner's defense, and provided resources to ensure that he received a fair trial and sentencing hearing...We believe trial counsel, as well as representatives of the State who had contact with Petitioner prior to trial and *knew* he was a citizen of Mexico, failed in their duties to inform Petitioner of his right to contact his consulate.[104]

87. As in the case of Mr. Valdez, consular officers had no opportunity to assist the defense in gathering mitigating evidence in the cases of thirty Mexican nationals listed in Mexico's Application. While many of those cases have not yet been fully investigated, as discussed above it is clear that in at least some of the cases, attorneys failed to detect compelling evidence of severe cognitive impairments. For instance, at least five Mexican nationals facing the death penalty have been found to be mentally retarded in the last three years alone, after Mexico alerted defense counsel to the need for psychological testing and/or referred defense counsel to competent, bilingual experts: Virgilio Maldonado,[105] Ramiro Ibarra Rubí,[106] José Calderon Palomino,[107]

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[104] *Valdez v. State*, 46 P.3d 703, 710 (Okla. Crim. App. 2002).

[105] Case No. 36 in Mexico's Application.

[106] Case No. 34 in Mexico's Application.

[107] *See* Declaration of Denise I. Young, Annex 5. Mr. Calderon Palomino was recently found ineligible for the death penalty, due to his mental retardation. He is not listed in Mexico's Application.

Francisco Gonzalez Reyes,[108] and Daniel Angel Plata.[109] In three of those cases, Mexico provided the necessary funds for testing and/or investigation, since defense counsel had no resources to retain a mental health expert.[110]

88. In other cases, trial attorneys failed to locate key mitigation witnesses living in Mexico. During post-conviction proceedings in those same cases, however, consular officers have found witnesses and arranged for defense counsel to interview them. For instance, in the case of Omar Fuentes Martinez,[111] the consulate located Mr. Martinez's brother by arranging a radio broadcast in Nuevo Laredo, Mexico, where the witness was living. The consulate knew that the majority of Mexicans, particularly in communities with high illiteracy rates, receive news through radio stations. The witness, who did not read or write, heard the announcement and responded. No decision has yet been issued in Mr. Martinez's post-conviction challenge.

B. THE UNITED STATES 'S FAILURE TO NOTIFY MEXICAN NATIONALS OF THEIR RIGHT TO CONSULAR ASSISTANCE

1. Fifty-four Cases of Non-Compliance With Article 36.

89. Fifty-four[112] Mexican nationals have been convicted and sentenced to death as a result of criminal proceedings in which the

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[108] Mr. Gonzalez Reyes, whose case is discussed in greater detail, *supra* at paras 67-69, is not listed in Mexico's Application since he pled guilty and received a life sentence.

[109] Case No. 40 in Mexico's Application.

[110] *See* Declaration of Roberto Rodríguez Hernández, para. 7, Annex 7.

[111] Case No. 15 in Mexico's Application.

[112] This number encompasses all of the Mexican nationals listed in Mexico's Application, except one: Angel Maturino Resendiz. In his case, Mexico has concluded that the authorities did provide the requisite notification "without delay;" that is, before taking any action detrimental to the rights of the detainee. Mexico therefore seeks no remedy for Mr. Maturino Resendiz (No. 37), since there was no apparent violation of Article 36.

United States failed to comply with their obligations to inform them, without delay, of their rights to consular notification and access under Article 36(1)(b).[113] Fifty-one of these nationals currently face death sentences in the United States.[114] In each case, the competent authorities had reason to be aware of the detained individual's Mexican nationality. Nevertheless, in each case, Mexican nationals were deprived of their rights to seek consular assistance, and Mexico was deprived of its right to provide consular services. In the vast majority of cases, Mexican consular officers learned of their nationals' detentions only coincidentally – through sources such as the national's family, media reports, or the national himself.

90. In thirty cases, Mexico learned of the detentions only after its nationals were already tried, convicted, and sentenced to death.[115] At that juncture, most often a number of years after the date of arrest, the Mexican consulate's assistance was necessarily limited to humanitarian assistance and the provision of legal assistance in post-judgment proceedings. As discussed more fully below, Mexico was prevented in these cases from providing consular services at the most critical phase of the capital murder prosecution; namely, prior to and during trial proceedings.

However, since the filing of Mexico's Application, Mexico has discovered an additional Mexican national under sentence of death in California. The detainee, Enrique Zambrano Garibi, was first detained in 1989, and was sentenced to death in 1993. The authorities never notified Mr. Zambrano of his rights under Article 36, nor did they notify Mexican consular officers of his detention. The case is discussed in detail in the Declaration of Roberto Rodríguez Hernández, Appendix A, paras. 146-149, Annex 7.

[113] *See id.*, Appendix A, Annex 7.

[114] Three Mexican nationals, Juan Caballero Hernández (No. 45), Mario Flores Urbán (No. 46), and Gabriel Solache Romero (No. 47), also were convicted and sentenced to death as a result of criminal proceedings in which the U.S. failed to abide by Article 36 of the Vienna Convention. Their sentences have since been commuted by former Governor Ryan of Illinois as his final act in office on 11 January 2003. Mexico continues to seek a remedy on their behalf to redress the authorities' failure to comply with Article 36 in their cases.

[115] *See* Declaration of Roberto Rodríguez Hernández, Appendix A, Annex 7.

91. In twenty-four cases, Mexico learned of the nationals' detentions before trial, but often after the authorities had obtained incriminating statements or taken other actions harmful to the rights of those nationals. In only three of these twenty-four cases did the authorities even attempt to comply with Article 36 in a timely manner. In two cases, the authorities notified the defendant of his rights under Article 36, but failed to provide the requisite notification "without delay."[116] In another case, the authorities failed to provide complete Article 36 notification to a mentally ill national specifically, failing to inform him that they would, on his request, inform the consular post of his detention, pursuant to Article 36(1)(b).[117]

92. In each of the fifty-four cases presenting violations of Article 36, had Mexico been notified by United States authorities of the detentions of its nationals without delay, Mexico would have rendered comprehensive legal and humanitarian assistance, consistent with its long-standing policy and practice in capital cases.

93. The cases of César Roberto Fierro Reyna and Carlos Avena Guillen, two Mexican nationals whose capital murder prosecutions were tainted by such failures, typify the plight of the fifty-four Mexican nationals facing execution. Mr. Fierro Reyna remains at imminent risk of execution in the state of Texas.

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[116]Marcos Esquivel Barrera (No. 7) and Arturo Juárez Suárez (No. 10). In the case of Arturo Juárez Suárez, despite the police department's full awareness of the defendant's nationality, the police interrogated Mr. Juárez Suárez and obtained an incriminating statement. Only after obtaining the statement– which was used as evidence against him at trial – did the authorities notify him of his rights to consular notification and access. In the case of Mr. Esquivel Barrera, the authorities formally notified him of his Article 36 rights more than one year after his arrest.

[117] In the case of Pedro Hernández Alberto (No. 13), the police officer who arrested him stated that he told the defendant that "if he wanted to contact the Mexican Consulate that he could." When the defendant failed to respond, the officer began to interrogate him. The officer neglected to inform Mr. Hernández Alberto that the authorities would inform the closest consular post of his detention, and would forward any communication from Mr. Hernández Alberto without delay.

2. César Roberto Fierro Reyna[118]

94. On 1 August 1979, Texas authorities arrested Mr. Fierro, age 22, on suspicion of murder of a taxi cab driver in El Paso, Texas on 27 February 1979.

95. El Paso sits directly across the border from Ciudad Juárez, Mexico. Shortly after the murder, witnesses positively identified two suspects as having been seen driving the victim's cab across the border into Ciudad Juárez on the night of the crime. The police recommended that capital murder charges be brought against them. Prosecutors instead charged both suspects with unauthorized use of the victim's taxi.

96. Five months after the homicide, a mentally disturbed juvenile offender approached the El Paso police and claimed that he had been a passenger in the victim's cab, and witnessed Mr. Fierro commit the murder. After discovering that Mr. Fierro was a Mexican national and resident of Ciudad Juárez , the El Paso police detectives drove to Juárez to meet with Juárez police Comandante Jorge Palacios. Shortly after this meeting, the Juárez police abducted Mr. Fierro's parents and held them in the Juárez jail.

97. The El Paso police then arrested Mr. Fierro at the El Paso County jail, and began their interrogation. He was never advised of his rights to consular notification and access under Article 36. At the time, he spoke little English, and had had only attended school for five years in Mexico.

98. Mr. Fierro initially denied any knowledge of the crime. Once he learned that the Juárez police had abducted his parents, however, he gave a full "confession" to the crime. After securing Mr. Fierro's confession, prosecutors dismissed the charges against the two initial suspects and released them from custody.

99. Almost immediately after his parents were released, Mr. Fierro recanted his confession, declaring that he was innocent and had

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[118] Case No. 30 in Mexico's Application. For detailed citations of the facts discussed in the case of Mr. Fierro, see Declaration of Roberto Rodríguez Hernández, Appendix A, paras. 163-182, Annex 7.

confessed only out of fear that his parents would face brutal torture at the hands of the notorious Juárez police if he did not cooperate.

100. At a pre-trial hearing to suppress Mr. Fierro's statement as having been coerced, however, the El Paso police detective insisted that he had no prior knowledge of the arrest of Mr. Fierro's parents in Juárez, that he had not conspired with the Juárez police and that no coercion was used to elicit the confession. Mr. Fierro's confession was found admissible by the court and the case proceeded to trial.

101. No physical evidence linked Mr. Fierro to the crime. Indeed, aside from the confession, no other evidence corroborated the alleged eyewitness account. At trial, Mr. Fierro's landlord corroborated his alibi for the night of the crime. The prosecution's key witness gave contradictory and bizarre testimony, at one point accusing one of the jurors of meeting him on the night of the homicide to purchase a stolen radio. The defense again argued that the confession was both coerced and fabricated, pointing to the fact that Mr. Fierro had insisted on adding to his statement a declaration that his parents were completely innocent of any involvement. Mr. Fierro's parents testified that they were detained by the Juárez police, threatened with torture and then abruptly released after their son confessed. The detective admitted that he had provided Mr. Fierro with the "fine points" for his confession, such as the date and location of the crime and the disposition of the body.

102. Nevertheless, on 12 February 1980, Mr. Fierro was convicted of murder. He was sentenced to death on 15 February 1980.

103. After his sentence was imposed, Mr. Fierro's mother sought the assistance of the Mexican consulate. Since that time, Mexico has provided extensive and ongoing consular assistance to Mr. Fierro. Consular officers have provided Declarations in appellate and post-conviction proceedings testifying that Mexican authorities would have immediately secured the release of his parents from unlawful custody, had they been informed of his arrest. Mexico has submitted a series of *amicus curiae* briefs in support of Mr. Fierro, asserting that his conviction and sentencing under these circumstances were in violation of international law. Mexico also has filed numerous diplomatic protests to the U.S. Department of State regarding the uncontested violation of Article 36 and has supported clemency for Mr. Fierro whenever a new execution date has been set.

104. With the assistance of Mexican consular officers, Mr. Fierro filed a petition for state post-conviction relief, asking the Texas state courts to reconsider his conviction and death sentence in light of the authorities' violation of his Article 36 rights. The court simply ignored the issue.

105. Throughout his state and federal appeals, Mr. Fierro continued to insist on his innocence, declaring that the El Paso police committed perjury to conceal their conspiracy to extract a false confession. However, each appellate court relied on the findings of the pre-trial suppression hearing to conclude that the police had testified truthfully and that the confession was voluntary.

106. In 1994, some fourteen years after the trial, Mr. Fierro finally obtained an evidentiary hearing on the claim of coercion. With the assistance of Mexican consular authorities, Mr. Fierro presented new evidence that included a letter rogatory from Jorge Palacios, the Juárez police commandant who had detained his parents, along with testimony from seventeen witnesses and voluminous documentary evidence. The reviewing court found that:

> At the time of eliciting the Defendant's confession, [the investigating detective] did have information that the Defendant's mother and step-father had been taken into custody by the Juárez police with the intent of holding them in order to coerce a confession from the Defendant, contrary to [the detective's] testimony at the pretrial suppression hearing.

107. The evidence presented led the presiding judge to conclude that "there is a strong likelihood that the Defendant's confession was coerced by the actions of the Juárez police and by the knowledge and acquiescence of those actions" by the El Paso detective. The judge ruled that Mr. Fierro should receive a new trial.

108. The Texas Court of Criminal Appeals unanimously adopted the trial court's findings of fact from the evidentiary hearing, agreeing that Mr. Fierro's "due process rights were violated" by the perjured testimony.

109. However, in a controversial 5-4 opinion, the Court nonetheless held that the violation constituted "harmless error" and refused to order a new trial, on the grounds that Mr. Fierro would have been convicted even

without his confession. This conclusion was squarely rejected by the trial prosecutor, who declared under oath that:

> Had I known at the time of Fierro's suppression hearing what I have since learned about the family's arrest, I would have joined in a motion to suppress the confession. Had the confession been suppressed, I would have moved to dismiss the case unless I could have corroborated [the eye witness] testimony. My experience as a prosecutor indicates that the judge would have granted the motion as a matter of course.

110. The federal courts consistently have adopted the same findings of fact that led to the call for a new trial, but have held that Mr. Fierro is procedurally barred from obtaining relief in the federal courts.

111. The State of Texas has opposed vigorously all efforts to obtain a remedy for the admitted violation of Mr. Fierro's constitutional rights.

112. Just days before his scheduled execution in 1997, the U.S. Court of Appeals for the Fifth Circuit allowed Mr. Fierro to file an additional *habeas corpus* petition to challenge his capital murder conviction on the ground that he was innocent of the crime. Ultimately, however, the Fifth Circuit concluded that Mr. Fierro's claim was procedurally barred, because he had filed his subsequent *habeas* petition shortly after the one-year deadline for such petitions had expired. Despite the fact that Mr. Fierro had complied fully with the briefing schedule set by the district court, his petition on grounds of actual innocence was thus denied as "procedurally defaulted," without any consideration of its merits. A subsequent petition to the United States Supreme Court for a writ of certiorari was denied without comment on 31 March 2003.

113. As Mr. Fierro has now exhausted both his primary and his successive appeals, the State of Texas has declared its intent to schedule his execution in the near future.

3. Carlos Avena Guillen[119]

114. On 15 September 1980, law enforcement authorities of Los Angeles County, California arrested Carlos Avena Guillen, a nineteen-year-old Mexican national. Mr. Avena was a suspect in a series of shootings in Los Angeles three days earlier, in which two people had died.

115. At the time of his arrest, Mr. Avena was registered with the Immigration and Naturalization Service, a fact that would have become apparent during routine verification of his identity by the police. Nonetheless, at no time was Mr. Avena informed of his rights under Article 36. Indeed, Mexican consular officers only became aware of his case more than 11 years after his conviction and sentence.

116. Despite his limited command of English, Mr. Avena was interrogated solely in that language and eventually confessed to the crime. His confession was surreptitiously recorded by police. Nowhere on the recording did the police advise him of his legal rights under U.S. constitutional law to keep silent and to have a lawyer appointed to defend him,[120] nor did they obtain his written consent to waive those rights. Furthermore, it is clear from the transcript of the recording that Mr. Avena attempted to terminate the interview (as he was legally entitled to do), to no avail.

117. At his trial, Mr. Avena pled not guilty. Unable to afford an attorney, he was provided with court-appointed legal counsel on 7 January 1981. For the next eleven months, the appointed attorney spent a total of just 53 hours preparing for his client's capital murder trial. The attorney met with his client four times, conducted no pre-trial

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[119] Case No. 1 in Mexico's Application. For detailed citations of the facts discussed in the case of Mr. Avena, see Declaration of Roberto Rodríguez Hernández, Appendix A, paras. 1-9, Annex 7.

[120] In *Miranda v. Arizona,* 384 U.S. 436 (1966), the United States Supreme Court held that, prior to interrogating a detained suspect, the police must inform him that (1) he has a right to remain silent; (2) anything he says can and will be used against him in a court of law; (3) he has the right to have a lawyer present during questioning; and (4) if he cannot afford a lawyer, one will be appointed for him.

investigation, presented no motions, retained no expert witnesses and failed even to interview Mr. Avena's closest relatives. Despite knowing that Mr. Avena had given a recorded confession, the attorney made no effort to have the statement suppressed before trial and reportedly failed to discuss its contents or circumstances with his client.

118. At trial, Mr. Avena's attorney made no opening statement and presented no witnesses. He did not object to the violation of his client's Article 36 rights. During his brief closing argument, Mr. Avena's attorney conceded the weight of the prosecution's evidence of the murders, declaring that "The tape is right in front of you, literally confessing to shooting down a couple of people... ." Mr. Avena was promptly convicted of both murders.

119. At the sentencing phase, Mr. Avena's attorney called no mitigation witnesses to make the case for a sentence other than death. His closing statement to the jury urged them to feel "no sympathy" for his client and he declared:

> He doesn't have any excuses. He's a bad person. There's no question about that. I submit that. I am not going to argue his good points...I never said anything like that. I understand the defendant that I have here. He doesn't come up here with a good reputation or a lot of kindness or whatever that might be. He doesn't have those things. He's a person that you can't like.

120. The jury recommended that Mr. Avena be sentenced to death. As a California Supreme Court judge later observed dissenting from a decision to deny Mr. Avena habeas relief,

> Having stripped his client of all vestiges of his humanity in the eyes of the jurors, having deprived him of any chance of stirring their compassion or deserving their mercy, [defense counsel] was then reduced to arguing that the jury should spare petitioner simply because some

> murderers are even worse. . . on this record [Mr. Avena] would probably have had a better chance of receiving a sentence of life imprisonment without possibility of parole if his counsel had made no argument at all.

121. On 14 February 1992, eleven years after Mr. Avena's death sentence was imposed, the Mexican consulate in San Francisco received a letter from the warden of the California State Prison in San Quentin stating that Mr. Avena was incarcerated and that prison records indicated he was a Mexican national. Mexican consular officers immediately visited him in prison, and began rendering humanitarian and other assistance.

122. Mr. Avena's counsel failed to raise any Article 36 violations in direct appeal and state post-judgment proceedings. His attorneys have recently filed an additional petition in state court, in which they have raised the violation of Article 36. The petition is still pending.

C. MUNICIPAL LAW BARS

123. With regard to the obligations of the United States under Article 36(2), if and when Mexican consulates learn of the detention, prosecution, and conviction of Mexican nationals, several doctrines of United States municipal law prevent Mexican nationals from obtaining meaningful review of violations of the Vienna Convention. Indeed, not a single Mexican national has obtained a judicial remedy for a violation of Article 36 – due, in large part, to these procedural obstacles.

124. In deference to these procedural rules, three Mexican nationals have been executed since 2000, despite the uncontested violation of Article 36 in their cases. The majority of the Mexican nationals have sought judicial remedies for violations of their Article 36 rights.[121] The courts have denied relief in every petition upon which they have ruled.[122]

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[121] *See* Declaration of Roberto Rodríguez Hernández, Appendix A (detailing cases) , Annex 7.

[122] *Ibid.*

In seven cases, the Article 36 violation has been presented, but is not yet resolved.[123] However, in all but one of those cases, it is virtually certain the courts will find the claim to be procedurally defaulted, since it was never raised at trial. At present, these procedural doctrines effectively preclude Mexican nationals from obtaining a judicial remedy for violations of Article 36.

1. Default Doctrines

125. In the cases before this Court brought by Paraguay and Germany with regard to the Vienna Convention, there was no dispute that the competent authorities of the United States failed to advise Mr. Breard or the LaGrand brothers, respectively, of their rights to consular notification and access.[124] Similarly, in the majority of the fifty-four cases before this Court, there is no credible dispute that the local authorities failed to advise the national "without delay" of his rights under Article 36 of the Convention. Yet in each case in which nationals have petitioned U.S. courts for redress, the courts have refused to provide a remedy. Quite often, the courts have justified this outcome by claiming that the national failed to comply with the applicable procedural requirements for properly raising a claim of an Article 36 violation. This is so even though the national was not previously aware of his rights precisely because the competent authorities failed to provide timely notification under Article 36. Although the Court confronted and rejected this purported justification in *LaGrand* as an independent violation of Article 36(2),[125] U.S. courts have continued to invoke this municipal doctrine to bar review of Article 36 violations.[126]

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[123] *Ibid.*

[124] *See Vienna Convention on Consular Relations (Paraguay* v. *United States of America), Provisional Measures, Order of 9 April 1998*, para. 18; *LaGrand (Germany v. United States of America), Merits, Judgment of 27 June 2001*, para. 15.

[125] *See LaGrand* at para. 15.

[126] Indeed, since the issuance of the *LeGrand* judgment, only one federal trial court has held that procedural default rules should not be invoked to avoid an Article 36 claim. *See Madej v. Schomig*, 223 F. Supp. 2d 968, 978-79 (2002).

a. State Procedural Default Rules

126. The fifty-four Mexican nationals described herein were prosecuted in ten different states, each of which has its own rules governing the procedures a criminal defendant must follow in order to properly raise and preserve a claim for relief. Under these state laws of procedural default, an otherwise meritorious claim is considered defaulted where the defendant (or his lawyer) did not follow the proper procedures in raising that claim. In most cases, once a state court has made such a determination, the legal argument cannot be resurrected in later proceedings in state or federal court. Courts have repeatedly held that foreign nationals, including several of the fifty-four nationals whose cases gave rise to these proceedings, have procedurally defaulted – that is, they have forever waived – meritorious claims under the Vienna Convention.[127]

b. Federal Procedural Default Rules

127. As the Court is aware from the *LaGrand* case, the procedural default doctrine in federal court operates in a similar way to thwart Mexican nationals from vindicating their rights under the Convention.

c. Non-Retroactivity: *Teague v. Lane*

128. Even if a Mexican national is able successfully to navigate the procedural default doctrines he must also overcome the non-retroactivity doctrine, known as the *Teague* doctrine.[128] Under this doctrine, a federal court may not grant a prisoner *habeas* relief based on new rules of criminal procedure announced after the prisoner's direct appeal

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[127] *See, e.g., State v. Reyes-Camarena*, 7 P. 3d 522, 524-26 (Or. 2000) (*en banc*) (state court decision denying Vienna Convention claim made by Mexican national in a capital case because, *inter alia*, he had failed to raise the claim in the trial court); *see also Valdez v. State*, 46 P. 3d 703, 707-710 (Okla. Crim. App. 2002) (state court decision denying Vienna Convention claim based on procedural default, despite determining that the trial and appellate counsel had been constitutionally deficient in failing to present certain mitigating evidence, which the efforts of Mexican consular officers had uncovered).

[128] *See Teague v. Lane*, 489 U.S. 288 (1989).

proceedings are completed.[129] Thus, the non-retroactivity doctrine comes into play when the prisoner attempts to rely on a new rule of criminal procedure in federal *habeas* proceedings.

129. A case announces a new rule of procedure "if the result was not *dictated* by precedent existing at the time the defendant's conviction became final."[130] Federal courts have consistently held that claims under the Vienna Convention raise a new rule of law that is not available in federal *habeas* proceedings.[131] As a result, the *Teague* doctrine assures that a foreign national is unable to vindicate his claim under the Vienna Convention.[132]

2. Denial of Rights-Based Remedies

130. Further, even if the claims of Mexican nationals are not barred by procedural default, federal and state courts hearing such challenges have failed to provide any effective judicial remedies. Specifically, in at least ten cases, the courts have uniformly refused to provide remedies such as *vacatur* of the conviction, *vacatur* of the death sentence, dismissal of the indictment, or even the suppression of self-incriminating statements garnered by authorities in proceedings tainted by acknowledged violations of Article 36 of the Vienna Convention.[133]

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[129] The completion of all direct appeal proceedings is further defined under United States law based on whether the petitioner seeks Supreme Court review of the case.

[130] *Teague*, 489 U.S. at 301 (emphasis in original).

[131] *See, e.g.*, Annex 56 (case of Plata) (judicial decision refusing to recognize Vienna Convention as creating a "personally-enforceable right" because such a finding "would create a new of law, violating the principles of Teague.").

[132] Like the procedural default doctrine, the *Teague* doctrine is subject to limited exceptions. However, no court has ever held, and no prosecutor has ever conceded, that claims under the Vienna Convention would fall within these exceptions.

[133] Arturo Juárez Suárez (No. 9), Juan Dedios Ramírez Villa (No. 20), Juan Ramón Sanchez Ramírez (No. 23), Eduardo David Vargas (No. 26), Ramiro Hernandez Llanas (No. 33), Juan Carlos Alvarez (No. 29), Félix Rocha Diaz

Moreover, the practice in U.S. courts in this regard has not changed since this Court's decision in *LaGrand*.

131. The courts' failure to provide a judicial remedy rests upon three basic holdings.

a. No Individual Rights

132. *First*, despite the United States Supreme Court's statement in *Breard* that Article 36 "arguably" creates individual rights[134] and this Court's finding in *LaGrand*,[135] federal and state courts considering the issue have found that the Vienna Convention does not confer individual rights on foreign nationals, and accordingly, a detained foreign national has no ability to vindicate his rights in a United States court.[136]

b. No Fundamental Rights

133. *Second*, state and federal courts have found that even assuming *arguendo* that the Vienna Convention creates individual rights, those rights are not "fundamental" rights on par with constitutional rights (e.g., the right to counsel) and do not justify judicial relief such as the dismissal of the indictment or the suppression of evidence. The judicial relief embodied in the suppression of evidence, in particular, is based upon the application of the constitutional rule of U.S. law that excludes evidence obtained in violation of a defendant's rights under federal or

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(No. 42), Jose Trinidad Loza (No. 52), Gabriel Solache (No. 47), and Ignacio Gomez (No. 32).

[134] *Breard v. Greene*, 523 U.S. 371, 376 (1998).

[135] *LaGrand, Judgment,* at para. 77.

[136] *See, e.g., U.S. v. De La Pava*, 268 F.3d 157, 164-65 (2d Cir. 2001) (finding that international law, the text of the Vienna Convention itself, and the Senate ratification hearings support the view that the Convention creates no judicially enforceable individual rights); *U.S. v. Emuegbunam*, 268 F.3d 377, 392 (6th Cir. 2001), cert. denied, 122 S. Ct. 1450 (2002) (same); *Bell v. Commonwealth*, 563 S.E.2d 695, 706 (Va. 2002) (denying the creation of enforceable individual rights under Vienna Convention); *State v. Martinez-Rodriguez*, 33 P.3d 267, 273 (N.M. 2001) (same).

state law (the so-called "exclusionary rule"). The general rule in federal and state courts is that neither the dismissal of the indictment nor the suppression of incriminating statements obtained from a foreign national are available remedies under the Convention. [137]

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[137] For federal cases, by Circuit, *see United States v. Nai Fook Li*, 206 F.3d 56, 61 (1st Cir. 2000) (*en banc*) (holding that even if Vienna Convention confers individual rights on foreign nationals, appropriate remedies do not include suppression of evidence or dismissal of an indictment because the treaty does not create "fundamental rights on par with the right to be free from unreasonable searches, the privilege against self-incrimination, or the right to counsel"), *cert. denied*, 531 U.S. 956 (2000); *United States v. De La Pava*, 268 F.3d 157, 165 (2d Cir. 2001) (government's failure to comply with the Vienna Convention does not justify the extraordinary remedy of dismissal of an indictment because Article 36 rights do not qualify as "fundamental"); *Murphy v. Netherland*, 116 F.3d 97, 99-100 (4th Cir.) (*habeas corpus* petitioner does not make "a substantial showing of the denial of a constitutional right," the precondition for obtaining appellate review, by asserting violation of his Vienna Convention rights), *cert. denied*, 118 S.Ct. 26 (1997); *United States v. Jimenez-Nava*, 243 F.3d 192 (5th Cir.) (Vienna Convention creates no judicially enforceable rights, but even assuming the contrary, suppression of evidence would be an inappropriate remedy), *cert. denied*, 533 U.S. 962 (2001); *United States v. Page*, 232 F.3d 536, 540-41 (6th Cir.) (even if Vienna Convention confers rights on foreign nationals, the nature of those rights does not justify the judicially created remedies of dismissal of an indictment or suppression of evidence), *cert. denied* 532 U.S. 935 (2001); *United States v. Chaparro-Alcantara*, 226 F.3d 616, 620-24 (7th Cir.) (even if Vienna Convention confers rights on foreign nationals, suppression of evidence is not the appropriate remedy for a violation of those rights), *cert. denied*, 531 U.S. 1026 (2000); *United States v. Lawal*, 231 F.3d 1045, 1048 (7th Cir. 2000) (reaffirming *Chaparro-Alcantara* and asserting that Article 36 of the Vienna Convention does not provide such an "extraordinary remedy"), *cert. denied*, 531 U.S. 1182 (2001); *United States v. Lombera-Camorlinga*, 206 F.3d 882, 885 (9th Cir.) (*en banc*) (even if Vienna Convention creates individually enforceable rights, the exclusion of evidence in a criminal proceeding is not among them), *cert. denied*, 531 U.S. 991 (2000); *United States v. Cordoba-Mosquera*, 212 F.3d 1194, 1196 (11th Cir.) (even if Vienna Convention creates rights enforceable by individuals, court would follow the lead of other circuits in holding that available remedies do not include suppression of evidence or dismissal of an indictment), *cert. denied*, 531 U.S. 1131 (2001). *See also United States v. Duarte-Acero*, 296 F.3d 1277, 1281-82 (11th Cir. 2002)(deferring to the U.S. State Department view that "the only remedies for a violation of the Vienna Convention are diplomatic, political, or derived from international law.").

3. Prejudice Requirement

134. *Third,* some courts have circumvented the previous issues by finding that even assuming Article 36 provides for an individual right and creates a fundamental right permitting a judicial remedy such as exclusion, the defendant would still not be entitled to such remedies absent a showing of prejudice; that is, that the violation harmed his interests in such a way as to affect the outcome of the proceedings.[138]

For state cases, *see, e.g., State v. Buenaventura,* 660 N.W.2d 38, 45 (Iowa 2003) (Iowa state court case adopting a rule that the exclusionary rule never applies to evidence obtained in violation of Article 36); *People v. Lopez*, 2002 WL 31898309, slip op. at *3 (No. G027444) (Cal. App. 4 Dist. 2002) (California state court holding that exclusionary rule does not apply to violations of the Vienna Convention); *Lopez v. State*, 558 S.E.2d 698, 700 (Ga. 2002) (Georgia state court finding that even if the Vienna Convention creates a privately enforceable right, nothing in its text requires the application of the exclusionary rule, and such a judicially-created remedy cannot be imposed absent a violation of a constitutional right); *State v. Chavez,* 19 P.3d 923, 925 (Or. 2001) (Oregon state court holding the exclusionary rule does not apply to Vienna Convention violations); *Zavala v. State*, 739 N.E.2d 135, 138-43 (Ind. 2000) (Indiana state court holding same); *People v. Corona*, 108 Cal. Rptr.2d 210, 211-12 (2001) (California state court holding same); *Rocha v. State*, 16 S.W.3d 1, 13, 19 (Tex. Crim. App 2000) (Vienna Convention, and indeed all international treaties, do not create "laws" within the meaning of Texas state statute that excludes evidence obtained in violation of the constitution or laws of Texas or the United States).

[138] *See, e.g., United States v. Santos*, 235 F.3d 1105, 1107-08 (8th Cir. 2000) (even if Vienna Convention confers judicially enforceable rights on foreign nationals, and even if the remedy for violations of those rights includes suppression of evidence, defendant foreign national's delay in exercising his Vienna Convention rights and the overwhelming evidence against him made any possible violation "harmless error"); *United States v. Ortiz*, 315 F.3d 873, 887-88 (8th Cir. 2002); *United States v. Minjares-Alvarez*, 264 F.3d 980, 987-88 (10th Cir. 2001) (post-*LaGrand*, finding defendant failed to show prejudice from the violation); *United States v. Cordoba-Mosquera*, 212 F.3d 1194, 1195-96 (11th Cir. 2000) (same), *cert. denied*, 531 U.S. 1131 (2001). *See also Breard v. Greene*, 523 U.S. 371, 377 (1998) ("[I]t is extremely doubtful that the [Vienna Convention] violation should result in the overturning of a final judgment of conviction without some showing that the violation had an effect on the trial.").

135. Invariably, the courts have applied a high threshold of proof of actual prejudice and have found the defendant failed to make that showing. In many cases, the federal courts have assumed that foreign nationals' right to be notified of the availability of consular assistance is superfluous when they have been notified of all United States constitutional and statutory rights, including the right to counsel.[139] Accordingly, a defendant is put into the difficult position of establishing that any advice rendered by the consulate would have been of assistance to him beyond his existing knowledge of rights garnered from *Miranda* warnings and/or defense counsel, and that furthermore, he would have followed whatever advice the consulate provided.[140]

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[139] *See, e.g., United States v. Rodriguez*, 68 F.Supp.2d 178, 183-84 (E.D.N.Y. 1999) ("Prejudice has never been—nor could reasonably be—found in a case where a foreign national was given, understood, and waived his or her *Miranda* rights."). *But see* United States State Department, Pub. No. 10518, *Consular Notification and Access: Instructions for Federal, State and Other Local Law Enforcement and Other Officials Regarding Foreign Nationals in the United States and the Rights of Consular officers to Assist Them* (released Jan. 1998) at 19-20. In response to the question of whether a foreign national must be given consular notification, even if the *Miranda* warning was given, the handbook directs that:

> Consular notification should not be confused with the *Miranda* warning, which is given regardless of nationality to protect the individual's constitutional rights against self-incrimination and to the assistance of legal counsel. Consular notification is given as a result of international legal requirements, so that a foreign government can provide its nationals with whatever consular assistance it deems appropriate. You should follow consular notification procedures with respect to detained foreign nationals in addition to providing Miranda or other warnings required. *Id.*

[140] *See, e.g., United States v. Moreno*, 122 F. Supp. 2d 679, 683-84 (E.D.Va. 2000) (finding no prejudice where defendant was provided proper notice of his *Miranda* rights, validly waived them, and failed to demonstrate how consular assistance would have affected his decision to waive those rights); *United States v. Rodriguez*, 68 F.Supp.2d 178, 184 (E.D.N.Y. 1999) (finding that prejudice can never be found where a foreign national was given, understood and waived his *Miranda* rights, because the advice a consular official would give would simply augment the content of *Miranda*); *United States v. Alvarado-Torres*, 45 F. Supp. 2d 986, 990-91 (S.D. Cal. 1999) (same). Indeed, despite the dozens of

136. In short, municipal default doctrines operate to preclude Mexican nationals from obtaining effective remedies based on violations of the Vienna Convention. Further, even where United States courts do not find the Vienna Convention claims to be procedurally barred, they have found that no judicial remedy is available to address those accepted violations. Finally, since the *LaGrand* decision was issued, no changes have taken place in the practices of state and federal courts to provide meaningful review for acknowledged violations of the Vienna Convention.[141]

D. MEXICO'S JUDICIAL AND DIPLOMATIC EFFORTS

137. Prior to filing its Application, Mexico repeatedly sought relief for violations of Article 36 in the United States courts and with the United States Executive Branch. Mexico also sought relief in the Inter-American Court of Human Rights. None of these efforts has been availing.

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cases in which U.S. courts have considered the issue, only two courts have found prejudice based explicitly on the Vienna Convention violations. *See State v. Reyes*, 1999 WL 743598, *3 (Del. Super., 1999) (prejudice found where the State conceded that defendant was not informed of his consular notification rights and defendant made incriminating statements which the State sought to introduce in its case-in-chief; motion to suppress upheld); *Valdez v. State*, 46 P.3d 703 (Okla. Crim. App. 2002) (case remanded for resentencing upon finding a reasonable probability that the jury would not have imposed the death penalty had defendant had the benefit of consular assistance, a thorough background investigation and adequate legal representation).

[141] *See* J. Fitzpatrick, The Unreality of International Law in the United States and the *LaGrand* Case, 27 *Yale Journal of International Law* (2002)at p. 428 (concluding that of the eight decisions involving uncontested Convention violations rendered by the federal courts of appeal after the *LaGrand* decision and before March 2002, not one provided any remedy to the defendant foreign national); A. Bishop, The Unenforceable Rights to Consular Notification and Access in the United States: What's Changed Since the *LaGrand* Case?, 25 *Houston Journal of International Law* (2002) at p.91 ("Since the LaGrand decision was issued, no visible changes have taken place in the practices of state and federal governments to ensure that foreign nationals' consular rights are protected.").

1. Efforts by Mexico Before Judicial Authorities of the United States

138. In order to prevent the executions of its nationals whose Article 36 rights were violated, Mexico has repeatedly intervened in the state and federal courts of the United States. For example, in 1997, Mexico filed suit in its own right in United States federal court. The federal court dismissed the lawsuit, and the court of appeals affirmed this decision, finding that Mexico's suit was barred by the Eleventh Amendment to the United States constitution.[142] Pursuant to this holding, neither Mexico nor its consular officers can gain access to the federal judicial forum in which to seek vindication of their rights under the Vienna Convention.

139. In addition, Mexico has filed at least sixteen *amicus curiae* briefs on behalf of its nationals over the last three years. Thus far, Mexico's legal arguments have failed to persuade any United States court that when the authorities violate Article 36 in a capital murder

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[142] *United Mexican States v. Woods*, 126 F.3d 1220 (9th Cir. 1997), *cert. denied* 523 U.S. 1075 (1998). Mexico had sought an injunction to prevent the execution of Ramon Martinez-Villareal, who the United States conceded had been convicted and sentenced in Arizona proceedings that did not comport with the Vienna Convention. In dismissing the suit, the court of appeals held that a suit to prevent an execution that had not yet occurred was actually a suit for retrospective relief barred by the Eleventh Amendment of the United States constitution and did not fall into any exceptions to the bar. *Id.*, 126 F.3d at 1223; *accord Paraguay v. Allen*, 134 F.3d 622 (4th Cir.) (affirming the district court's dismissal of action by Paraguay alleging violations of its Vienna Convention rights on Eleventh Amendment grounds), *cert. denied sub nom Breard v. Greene*, 523 U.S. 371 (1998); *see also Consulate General of Mexico v. Phillips*, 17 F. Supp. 2d 1318 (S.D.Fl. 1998). The United States Supreme Court did not consider the merits of the dismissal of Mexico's suit. However, in response to similar suits brought by Paraguay and Germany, the Supreme Court did state in *dicta* that a foreign state's suit to enjoin an imminent execution of one of its nationals based upon a Vienna Convention violation did not constitute circumstances sufficient to defeat Eleventh Amendment immunity. *Breard v. Greene*, 523 U.S. 371, 377-78 (1998); *Federal Republic of Germany v. United States*, 526 U.S. 111, 112 (1999) (declining to exercise original jurisdiction over Germany's suit against Arizona based on Vienna Convention violations because, *inter alia*, it would be "in probable contravention of Eleventh Amendment principles").

prosecution, they must provide a meaningful remedy for the violation. Moreover, Mexico has failed to persuade any U.S. court that, under the *LaGrand* decision, the United States courts may not apply municipal bars such as the procedural default doctrine to prevent "review and reconsideration" of the national's conviction and sentence.

2. Diplomatic Démarches

140. Over the past decades, Mexico has also pursued numerous diplomatic and political channels to enlist the assistance of the Executive Branch of the U.S. Government in remedying violations of the Vienna Convention and ensuring their non-repetition. Specifically, Mexico has filed diplomatic notes in at least twenty capital cases involving Mexican nationals over the last six years.[143] In each note, Mexico reiterated the vital nature of the rights to consular notification and access, expressed its view that violations of Article 36 are incompatible with international law, and requested that those views be conveyed to local authorities.

141. One of the earliest capital cases that resulted in an execution despite Mexico's protests was that of Irineo Tristan Montoya, who was executed by the State of Texas on 18 June 1997. In the fifteen months prior to Mr. Montoya's execution, Mexico filed four diplomatic protests with the United States Department of State in which Mexico raised the Vienna Convention violations.[144] Nevertheless, the United States failed to respond to the notes before Mr. Montoya's execution.

142. The day following Mr. Montoya's execution, Mexico filed a fifth diplomatic note, protesting the execution and the failure of the United States to respond to its previous notes.[145] In that note, Mexico

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[143] *See* Annexes 8-26.

[144] Specifically, in emphasizing that competent authorities of Texas had failed to comply with Article 36(1)(b), Mexico formally requested that the Texas Board of Pardons and Paroles commute Mr. Montoya's sentence and sought, at a minimum, a thirty-day reprieve from the Governor of Texas in order to allow time for a full investigation of the circumstances of the consular rights violation. *See* Diplomatic Notes from Notice to United States Department of State: Note 000409 of 14 March 1996; Note 00067 of 6 May 1997; Note DAN-01657 of 11 June 1997; Note 00087 of 17 June 1997, Annex 16.

[145] *See* Diplomatic Note 000896 of 19 June 1997, Annex 16.

specifically observed that the United States had failed to provide information to the United States courts regarding the violations of Article 36 and requested that the United States adopt necessary measures to prevent "new irreparable events such as the one which occurred yesterday."[146]

143. On 9 July 1997, the United States apologized for the execution of Mr. Montoya.[147] Mexico filed a sixth diplomatic note in response.[148] In this final note, Mexico thanked the United States for its apology, but reiterated its view that the United States needed to do more, particularly in capital cases, to vindicate the rights contained in Article 36. Mexico observed that, as of 5 August 1997, there were thirty-six cases of Mexican nationals sentenced to death in the United States, and that in all of those cases the competent authorities had failed to comply with Article 36. Mexico noted that its concern over the violations was mounting, given the increased number of Mexican nationals who had been sentenced to death without being promptly advised of their rights to consular notification and access. Mexico also advised the United States of its view that the violations of Article 36 undermined its nationals' due process rights. Mexico requested that the United States make its position clear before state authorities and the United States courts with regard to the violations of Article 36. Finally, Mexico requested a guarantee that in future cases, Mexico be duly notified by state authorities whenever one of its nationals was detained and charged with a capital crime.[149]

144. Notwithstanding Mexico's efforts, neither the Executive Branch of the federal government nor the competent authorities of the State of Texas took any steps to ensure meaningful review and reconsideration of Mr. Montoya's case. Instead, United States authorities refused to allow even a temporary stay of the execution, and the Texas state authorities expressed the view that it was not their

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[146] *Id* (unofficial English translation).

[147] *See* Diplomatic Note 001118 from Mexico to United States Department of 5 August 1997, Annex 16.

[148] *Id.*

[149] *Id.*

responsibility to determine whether there had been a violation of the Vienna Convention, since Texas had not signed the treaty.[150]

145. Less than three months later, on 18 September 1997, the State of Virginia executed Mexican national Mario Benjamin Murphy. Mexico had filed a diplomatic protest with the Department of State regarding Mr. Murphy's case in June 1997.[151] In that protest, Mexico informed the State Department that not only did Virginia state authorities fail to inform Mr. Murphy of his right of consular access upon his arrest, but state prison officials subsequently refused his request to contact the consulate.[152] Again, Mexico formally requested commutation of the sentence.[153]

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[150] *See* Declaration of Roberto Rodríguez Hernández, para. 28, Annex 7.

[151] *See* Diplomatic Note 000948 from Mexico to United States Department of State of 25 June 1997, Annex 17.

[152] Diplomatic Note 001394 from Mexico to United States Department of State of 25 September 1997, Annex 17.

[153] *See* Diplomatic Note 001275 from Mexico Embassy to U.S. State Department of 8 September 1997, Annex 17; Diplomatic Note 001308 from Silva Herzog, Mexican Ambassador to Assistant Secretary for Inter-American Affairs, U.S. State Department of 10 September 1997. In conversations with the Ambassador of Mexico to the United States, the United States opined that the outcome of Mr. Murphy's case was not affected by the violation. In response to this opinion, the Ambassador sent a letter to the United States urging the United States to join Mexico in requesting a commutation because:

> In any given case whether a foreign national's case would be affected by denial of his Article 36 rights will always be a matter of conjecture. . . . From our perspective, as a foreign Government, the question whether the United States has complied with its international legal obligations under the Vienna Convention is even more important. That treaty gives foreign nationals Article 36 rights in every instance and the very denial of these rights should be protected irrespective of whether in any case their exercise would 'have affected the outcome' of any given matter.

146. State and federal authorities of the United States took no action in response to this protest. After Virginia executed Mr. Murphy, the Department of State apologized to Mexico.[154]

147. Three years later, on 9 November 2000, the State of Texas executed Mexican national Miguel Angel Flores. In that case, Texas officials conceded that they had violated Mr. Flores's rights under Article 36(1)(b). Again, Mexico protested formally to the Department of State and made diplomatic overtures to Texas state authorities.[155] Again, Mexico sought a commutation of Mr. Flores's sentence or a reprieve of his execution.[156] This time, Mexico took the further steps of sending diplomatic representatives to meet with the Chairman of the Texas Board of Pardons and Paroles, as well as supporting Mr. Flores's petition to the Inter-American Commission on Human Rights, which issued precautionary measures.[157] Finally, Mexico sought aid from other foreign states, and the governments of Argentina, Chile, Honduras,

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Diplomatic Note 001308 from Silva Herzog, Mexican Ambassador to Assistant Secretary for Inter-American Affairs, U.S. State Department of 10 September 1997, Annex 17.

[154] *See* Declaration of Roberto Rodríguez, para. 29, Annex 7. One week after the execution, Mexico filed another diplomatic note, observing that an apology was an insufficient remedy for a violation of Article 36 in a capital case. Mexico conveyed to the United States its strong opinion that the United States must take "specific actions" to guarantee compliance with Article 36. Furthermore, Mexico noted that the United States should take a more active role in enforcing the Vienna Convention in the United States courts, since it was responsible for ensuring compliance with the provisions of the Convention. Mexico reiterated that there were still 35 Mexican nationals remaining on death row, all of whom had been deprived of their rights to consular notification. *See* Diplomatic Note 001308 from Silva Herzog, Mexican Ambassador to Assistant Secretary for Inter-American Affairs, U.S. State Department of 10 September 1997 (referencing the apology of the United States), Annex 7.

[155] *See* Diplomatic Note 001205 from Mexican Embassy to U.S. State Department of 14 November 2000, Annex 11.

[156] *Id.*

[157] *See* Inter-American Commission on Human Rights, Press Communiqué, No. 17/100, dated 13 November 2000, para. 3.

Panama, Poland, Spain, Switzerland and Uruguay, as well as the European Union, intervened diplomatically on its behalf.[158]

148. Again, U.S. federal and state authorities took no meaningful action to ensure review of the proceedings by which Mr. Flores was convicted and sentenced or to stay the execution. After Texas executed Mr. Flores, the Department of State, by a note dated 9 November 2000, apologized to Mexico for the failure of Texas authorities to comply with Article 36 of the Vienna Convention in the case of Mr. Flores.[159]

149. In the recent cases of Mexican nationals Gerardo Valdez and Javier Suárez Medina, whose executions were scheduled to occur after this Court's ruling in *LaGrand*, the only action taken by the United States in response to Mexico's extensive diplomatic efforts was to send terse letters to the state clemency authorities in each case, requesting that they "consider" the Article 36 violations.

150. Specifically, in the case of Gerardo Valdez, it is undisputed that Mr. Valdez was arrested, detained, tried, convicted, and sentenced to death by the State of Oklahoma without receiving notification of his Article 36 rights.[160] Mexico filed a diplomatic note protesting the violation and Consular officers immediately assisted Mr. Valdez in the only way possible at that stage: intervention before the Oklahoma Board

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[158] *See* Declaration of Roberto Rodríguez Hernández, para. 30, Annex 7.

[159] *See* Diplomatic Note from U.S. State Department to Embassy of Mexico of 9 November 2000, Annex 11.

[160] *See Oral Argument, Avena and Other Mexican Nationals (Mexico v. United States)*, para. 3.12 (argument of Catherine Brown, U.S. State Dep't). Mexico first learned of Valdez's arrest in April 2001, only two months before his scheduled execution date, when one of Mr. Valdez's relatives contacted the Mexican consulate. By conducting a brief but thorough investigation of Mr. Valdez's history, Mexico discovered that he had suffered brain damage and other trauma that should have been presented to the Oklahoma jury as mitigating evidence relevant to its decision whether to sentence Mr. Valdez to death. Specifically, upon learning of Mr. Valdez' impending execution, Mexico hired experienced counsel, an investigator and a bilingual neuropsychologist to assist Mr. Valdez. *See* Declaration of Roberto Rodríguez Hernández, para. 31, Annex 7.

of Pardons and Paroles.[161] Based on new evidence uncovered by Mexico, Oklahoma's Board of Pardons and Paroles, after holding a public hearing with the presence of Mexican diplomatic representatives, recommended that Valdez's sentence be commuted to life imprisonment.[162] At the request of President Vincente Fox, Oklahoma's Governor, Frank Keating, granted a 30-day reprieve to study the case, during which this Court issued its decision in the *LaGrand* case. Mexico then sent a Delegation headed by the Foreign Ministry's Legal Advisor to meet with Governor Keating and explain Mexico's views on the case.

151. Following the issuance of the judgment in the *LaGrand* case, the State Department, in a perfunctory gesture similar to that made to the Governor of Virginia in the *Breard* case, "requested" that Governor Keating consider whether the Vienna Convention violation "had any prejudicial effect on either Mr. Valdez's conviction or his sentence."[163]

152. After receiving the letter from the State Department, Governor Keating rejected the Board's recommendation and denied clemency. In his letter to the President of Mexico explaining his reasons for denying clemency, Governor Keating stated:

> Taking the decision in LaGrand into account, I have conducted this review and reconsideration of Mr. Valdez's conviction and sentence by taking account of the admitted violation of Article 36 of the Vienna Convention regarding consular notification... While it is true that Mr. Valdez was not notified of his right to contact the Mexican Consulate in clear violation of Article 36 of the Vienna Convention on Consular Relations, that violation, while regretful and inexcusable, does not, in and of itself, establish clearly discernible prejudice or that a different conclusion would have been

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[161] *See* Diplomatic Note 000445 from Mexican Embassy to U.S. State Department of 10 May 2001, Annex 26.

[162] *See* Declaration of Roberto Rodríguez Hernández, para. 38, Annex 7.

[163] *Letter from William H. Taft IV, Legal Advisor for the U.S. Department of State to Frank Keating, Governor of Oklahoma*, July 11, 2001, Annex 26.

reached at trial or on appeal of Mr. Valdez's conviction or sentence.[164]

153. Oklahoma's court of last resort, moreover, refused to respect the ruling in *LaGrand* that the municipal law doctrine of procedural default must not be applied in a manner that bars consideration of the Vienna Convention violations.[165]

154. On 14 August 2002, the State of Texas executed Mexican national Javier Suárez Medina. Again, Mexico had sent diplomatic notes, both in 1997 and in 2002, protesting the violations of Mr. Suárez's Vienna Convention rights.[166] Mexico's Foreign Minister communicated Mexico's concerns directly to the United States Secretary of State, and the President of Mexico personally communicated with the Governor of Texas to request a reprieve. Mexico also sent diplomatic representatives to meet with the Secretary of State of Texas and with the Chairman of the Texas Board of Pardons and Paroles. Additionally, Mexico supported Mr. Suárez's petition to the Inter-American Commission on Human Rights, which resulted in the issuance of precautionary measures

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[164] *Letter from Governor Keating to the Hon. Vicente Fox Quesada, President of Mexico*, July 20, 2001, Annex 26.

[165] *See Valdez*, 46 P.3d at 707-09. The court ultimately determined, in an unprecedented decision, that Valdez's trial and appellate counsel had been constitutionally ineffective for failing to discover and present the mitigating evidence uncovered by Mexico's efforts. It was on this basis, not on the basis of the violation of Article 36, that the court ordered the Oklahoma trial court to re-sentence Valdez. *Id.* at 710.

[166] *See* Diplomatic Note from Mexican Embassy to U.S. State Department of 31 October 1997; Diplomatic Note from Mexican Embassy to U.S. State Department of 17 July 2003, Annex 25. Prior to the diplomatic efforts, Mexico had vigorously supported Mr. Suárez's efforts to obtain judicial review of his Article 36 violation, filing *amicus curiae* briefs in the Texas Court of Criminal Appeals and the United States Supreme Court. When the Texas court invoked the municipal doctrine of procedural default to avoid reaching the merits of the claim, Mexico and 13 other nations filed an *amicus* brief in support of Mr. Suárez's petition for review with the United States Supreme Court. *See* Declaration of Roberto Rodríguez Hernández, para. 32, Annex 7. The Supreme Court denied review of the case.

by the Commission. At Mexico's behest, Argentina, Brazil, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Panama, Paraguay, Poland, Slovenia, Spain, Switzerland, Uruguay, Venezuela, the Holy See, and the European Union supported Mr. Suárez's efforts before judicial and administrative authorities to obtain meaningful review and reconsideration of the admitted violation of his rights under Article 36(1)(b).[167]

155. The United States did not provide such review, nor did it stay the proceedings. Instead, the State Department, in another perfunctory gesture, sent a letter to the Texas Board, conveying the Department's "request" that the Board give "specific attention" to the acknowledged violation of Mr. Suárez's Article 36(b) rights.[168] Without discussion amongst the members of the Board, or convening a hearing, or even responding to Mr. Suarez's request for a hearing, the seventeen members of the Board voted by fax to deny the commutation. There is no record of any deliberations and contrary to the State Department's advice, the Board provided no written explanations for their action.[169]

3. Action in the Inter-American Court of Human Rights

156. Faced with the continuing pattern and practice of Vienna Convention violations by United States authorities, Mexico sought a declaration of its rights in the Inter-American Court of Human Rights in December 1997. In that case, the United States argued, *inter alia*, that the failure of a receiving state to notify a detained foreign national of his

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[167] Declaration of Roberto Rodríguez Hernández, para. 32, Annex 7.

[168] *Letter from William H. Taft IV, Legal Advisor for the U.S. Department of State to Gerald Garrett, Chairman, Texas Board of Pardons and Paroles,* August 5, 2002, Annex 25.

[169] As a result of the execution of Mr. Suárez, the President of Mexico cancelled his announced official visit to Texas formally to protest the violation of international law. *See* Declaration of Roberto Rodríguez Hernández, para. 39, Annex 7. In a press release issued on the day of the execution by the Office of the President, the position of Mexico on Article 36 was reiterated. The Department of State did not apologize to the Government of Mexico for the violations committed in this case. *See ibid.*

consular rights may only properly result "in diplomatic measures that seek to address such a failure and improve future compliance."[170]

157. The Inter-American Court rejected the United States' position. In Advisory Opinion OC-16/99, that Court held that failure to respect the right to consular assistance established by Article 36(1)(b) of the Vienna Convention would prejudice the due process rights of foreign nationals such that the imposition of capital punishment under such circumstances would violate the human right not to be deprived of life arbitrarily.[171] That violation, the Court found, gives rise to international responsibility and the obligation to provide reparations.[172]

158. The Inter-American Court's decision has had no apparent effect on the policy and practice of the United States. After the Inter-American Court issued its Advisory Opinion, several foreign nationals attempting to vindicate their consular rights sought to rely upon this ruling in U.S. courts, to no avail. The federal courts considering the issues dismissed the relevance of the Advisory Opinion and held that Convention violations could not be remedied by the U.S. judiciary.[173]

E. UNITED STATES'S CONTINUING VIOLATIONS OF ARTICLE 36 OF THE VIENNA CONVENTION

159. All of the nationals named in Mexico's Application were arrested prior to this Court's ruling in *LaGrand*.[174] Mexico is entitled to

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[170] *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion OC-16/99 of 1 October 1999, Inter-Am. Ct. H.R. (Ser A) No. 16, para. 26 (1999).

[171] *Id*, para. 141(7).

[172] *Ibid.*

[173] *See, e.g., United States v. Li*, 206 F.3d 56, n. 4 (1st Cir. 2000) (*en banc*) (dismissing relevance of the Advisory Opinion by noting "the United States is not a party to the treaty that formed the [Inter-American Court of Human Rights], and is not bound by that court's conclusions.").

[174] Two nationals were convicted and sentenced to death after *LaGrand*; Specifically, Mr. Marcos Esquivel Barrera was convicted on 17 July 2001 and

relief for the Article 36 violations in their cases, even if, as the United States maintains, the authorities' compliance with Article 36 has improved in the intervening years.

160. Any claim by the United States that its current compliance with Article 36 is near-universal or has even substantially improved since the decision,[175] however, is belied by the ongoing failure of competent authorities to advise Mexican nationals of their Article 36 rights without delay upon arrest. A comprehensive survey conducted by the Mexican Foreign Ministry of the forty-five Mexican consulates covering jurisdictions throughout the United States reveals that violations of Article 36 remain commonplace, despite *LaGrand*, and despite the United States's efforts to increase compliance.[176]

161. Together, the consulates identified no fewer than 102 cases of Mexican nationals detained on serious criminal charges after 27 June 2001, none of which were notified of their Article 36 rights. In eighty-

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sentenced on 13 December 2001 and Mr. Pedro Hernández Alberto was convicted on 4 November 2001 and sentenced on 28 May 2002.

[175] *Oral Argument 21 Jan. 2003, Case Concerning Avena and Other Mexican Nationals (Mexico v. United States), Rebuttal*, at 10-11 (argument of Catherine Brown):

> [A]ll of the arrests [of Mexican nationals named in the Application] predate the *LaGrand* decision, and many predate our efforts to intensify our compliance efforts which began in the early 1990s. I would also note that Mexico failed to acknowledge that there are literally thousands of Mexicans arrested in the United States each week, and there are hundreds of thousands of Mexicans living in the United States. Viewed in that context, I submit that Mexico has failed to show that there is even a likelihood that a Mexican arrested today in the United States will not be advised of his rights under Article 36.

[176] All forty-five Mexican consulates provided information regarding Mexican nationals detained and charged with serious felonies after the issuance of the *LaGrand* judgment, who were not advised of their rights to consular notification and access. The consulates also provided information with respect to implementation of Article 36 by the competent authorities within each of their jurisdictions. *See* Declaration of Roberto Rodríguez Hernández, paras.42-47 and Appendix B, Annex 7.

nine of the cases, nationals have been charged with homicides; of these, thirty-six could receive the death penalty. The remaining cases involve charges such as attempted murder, assault, and kidnapping. In each of these cases, there is no record of any notification to the national or the consulate. Rather, the relevant consulates became aware of the cases through media reports, contact with the detained national's family or friends, and/or by taking the initiative to review weekly arrest lists supplied by law enforcement authorities.[177]

162. The cases reported by the consulates and described in the Declaration of Ambassador Rodríguez by no means represent the entire universe of cases in which the authorities have violated Article 36. Indeed, the consulates reported additional cases in which the treaty provision was violated, but unless they involved crimes for which the national could face a lengthy term of imprisonment, they were excluded from the attached report. Moreover, Mexico is certain that the consulates are not aware of every case in which the authorities' failed to notify a detained national of his rights to consular notification and access, precisely because of the ongoing violations of Article 36.

163. With regard to overall compliance with Article 36, nineteen consulates[178] reported widespread non-compliance with the treaty provision, and nineteen consulates[179] reported mixed compliance. Only

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[177] *Ibid.*

[178] These consulates are located in Los Angeles (California), San Jose (California), Presidio (Texas), Las Vegas (Nevada), Oxnard (California), Omaha (Nebraska), Detroit (Michigan), Chicago (Illinois), Raleigh (North Carolina), Orlando (Florida), Santa Ana (California), Del Rio (Texas), Miami (Florida), New York (New York), Atlanta (Georgia), Philadelphia (Pennsylvania), Boston (Massachusetts), Portland (Oregon), and Fresno (California).

[179] The consulates are located in San Bernardino (California), Austin (Texas), Houston (Texas), San Antonio (Texas), McAllen (Texas), Brownsville (Texas), El Paso (Texas), Sacramento (California), San Francisco (California), San Diego (California), Calexico (California), Albuquerque (New Mexico), Phoenix (Arizona), Dallas (Texas), Kansas (Kansas), Seattle (Washington), Denver (Colorado), Washington D.C., and Salt Lake City (Utah).

six consulates[180] reported no violations of Article 36, all of them located on or near the Mexican border.[181]

164. Of those consulates detailing mixed compliance, many reported that while notification is received from authorities in a certain limited number of counties within a state, most counties either do not comply at all, or only comply with regard to minor misdemeanor cases.[182]

165. For example, the Sacramento consulate reported that it has never received notification of the detention of a Mexican national in any of the ten counties comprising California's Central Valley, in which the majority of Mexican nationals reside.[183] The Atlanta consulate, which is responsible for 403 counties in four states (Georgia, Alabama, Michigan, and Tennessee), calculated that from the period between January 2002 and 15 April 2003, the consulate became aware of and registered 1,555 detained Mexican nationals in its the consular protection system.[184] In that same period, there were been only 272 notifications from authorities, translating to a level of compliance of roughly 17.49%.[185]

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[180] These consulates are located in Yuma (Arizona), Tucson (Arizona), Nogales (Arizona), Eagle Pass (Texas), Laredo (Texas), and Douglas (Arizona).

[181] One consulate, in Indianapolis (Indiana), opened in November 2002, and could not provide sufficient data regarding compliance.

[182] *See* Declaration of Roberto Rodríguez Hernández, Appendix B, paras. 46-47, Annex 7. Moreover, of those consulates reporting mixed compliance, it appears that federal immigration and criminal authorities comply with article 36 with somewhat greater frequency than their state or local counterparts. The Presidio consulate, for instance, reports that only federal immigration authorities provide written notification to detainees of their consular rights.

[183] *See id.*, paras. 21-29.

[184] *See id.*, paras. 122-130.

[185] *See id.*, para. 125. The number is necessarily an underestimate, as it cannot capture the presumed number of detained Mexican nationals of which the consulate has no knowledge.

166. Similarly, the Philadelphia consulate estimated that it receives notification from competent authorities in only 5 or 6 out of 100 cases.[186] The Miami consulate likewise reported that while two counties regularly provided notifications, eleven did not.[187] The Miami consulate further reported that at times, local authorities have actively prevented detained nationals from communicating with the consulate, despite the nationals' explicit requests to do so.[188]

167. The recent case of Joel Huber Mendoza illustrates the now-familiar litany of the authorities' ongoing failure to notify detained Mexican nationals of their rights pursuant to article 36. On 1 December 2001, Mr. Mendoza was arrested by law enforcement authorities in Stanislaus County, California for triple homicide. Mr. Mendoza has a history of mental instability. The authorities did not inform Mr. Mendoza of his right to consular assistance pursuant to Article 36. Mexican consular officers did not become aware of the case until 8 November 2002, when Mr. Mendoza's defense attorney notified the consulate in order to obtain assistance in his case. It was only after the consulate wrote a letter to the authorities protesting the lack of notification that the authorities issued a letter informing the consulate of Mr. Mendoza's detention, almost one year after his initial arrest. If convicted, Mr. Mendoza may be sentenced to death.

168. Details of each of the 102 cases and the documented article 36 violations are included in the Annexes.[189]

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[186] *See id.*, para. 146.

[187] *See id.*, para. 90.

[188] *See ibid.*.

[189] *See* Declaration of Roberto Rodríguez Hernández, Appendix B, Annex 7.

IV.

VIOLATIONS OF THE VIENNA CONVENTION BY THE UNITED STATES

169. In each of the fifty-four separate cases that form the basis of this action, the United States has violated Mexico's rights under the Vienna Convention, as well as the individual rights of its nationals, which Mexico raises in its exercise of diplomatic protection.[190] *First*, the United States breached the unequivocal language of Article 36(1)(b) by failing to notify the fifty-four Mexican nationals of their consular rights without delay, thereby also depriving Mexico of its right to provide consular protection and assistance to its nationals. *Second*, the United States breached Article 36(2) by employing certain municipal law doctrines to prevent the Mexican nationals from challenging their convictions and death sentences on the basis of the United States's violations of Article 36(1).

A. BY FAILING TO NOTIFY MEXICAN NATIONALS OF THEIR ARTICLE 36 RIGHTS WITHOUT DELAY, THE UNITED STATES VIOLATED ARTICLE 36(1) OF THE VIENNA CONVENTION.

1. Article 36(1) Obligated the United States to Notify Mexican Nationals of their Rights Under The Vienna Convention "Without Delay," Meaning Before Taking Any Action Potentially Prejudicial To the Rights of the Foreign National.

170. The United States does not contest that Article 36(1)(b) required the competent authorities to notify each of the fifty-four Mexican nationals "without delay" of their rights under the Vienna Convention.

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[190] *Mavrommatis Palestine Concessions Case*, P.I.C.J. Series A/No.2; *Barcelona Traction Case*, 1970 I.C.J. Reports; *Interhandel*, 1959 I.C.J. Reports; *Elettronica Siccula*, 1989, I.C.J. Reports.

171. Article 36(1) "establishes an interrelated régime designed to facilitate the implementation of the system of consular protection."[191] Specifically, Article 36(1)(a) provides:

> (a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State.

172. This provision sets forth "the basic principle governing consular protection: the right of communication and access."[192] It constitutes the foundation of consular protection. The consular rights set forth in Article 36(1), and the consular functions enumerated in Article 5,[193] depend on the ability of a consular officer to communicate freely and promptly with the sending State's nationals. As the United States has emphasized, "communication is so essential to the exercise of consular functions that its preclusion would render meaningless the entire establishment of consular relations."[194]

173. Article 36(1)(c) elaborates on "the measures consular officers may take in rendering consular assistance to their nationals in the custody of the receiving State."[195] It provides:

> (c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national

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[191] *LaGrand (Germany v. United States of America), Merits, Judgment of 27 June 2001*, para. 74.

[192] *Id.*, para. 74.

[193] *See* Vienna Convention, Chapter 1, arts. 5(a), (e), (g), (h), (i).

[194] *United States Diplomatic and Consular Staff in Tehran (United States v. Iran), 1980 I.C.J. Pleadings*, p. 174.

[195] *LaGrand*, para. 74.

of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. . . .

174. The notification right embodied in Article 36(1)(b) is the predicate for the exercise of all the other consular rights provided in Article 36. This subparagraph "spells out the modalities of consular notification" and "the obligations of the receiving State toward both the detained person and the sending State."[196]

175. *First*, "competent authorities of the receiving State shall, without delay, inform" any foreign national of the sending State "in prison, custody or detention" of his right to communicate with his consulate.[197]

176. *Second*, if the detained national of the sending State "so requests, competent authorities of the receiving State shall, without delay, inform the consular post of the sending State, if within its consular district, a national of that State [has been] arrested or committed to prison or to custody pending trial or [has been] detained in any other manner."

177. *Finally*, communications from the detained national of the sending State to his consulate shall be forwarded by competent authorities of the receiving State "without delay."

a. The Travaux Préparatoires and U.S. Practice Confirm That "Without Delay" Is a Functional Expression of Immediacy.

178. It is clear that the purpose of Article 36(1) is to ensure immediate consular notification and assistance to any detained foreign national. The timing of the notice is critical to the exercise of the rights provided by Article 36; for this reason, Article 36(1)(b) repeatedly reinforces the necessity of consular notification and access "without delay." Indeed, this phrase appears in every sentence of subparagraph (b).

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[196] *Id.*, paras. 74, 77.

[197] Vienna Convention, art. 36(1)(b).

179. The *travaux préparatoires* for the Vienna Convention confirm that the intent of the phrase "without delay" was to require unqualified immediacy.

180. The original text proposed by the International Law Commission for Article 36(b) employed the phrase "without *undue* delay." The United Kingdom proposed an amendment, which was accepted, deleting the word "undue" to avoid the implication "that some delay [would be] permissible."[198]

181. The Soviet delegate objected to the deletion of the word undue because "[t]he new wording seemed to imply an obligation to supply the information *immediately* . . ."[199] No delegate voiced disagreement with the Soviet Union's interpretation that Article 36(1)(b), after the deletion of "undue," required immediate notification. The *travaux* make clear that other states were quite anxious to get the Soviet Union to agree on a text. If any from the Western bloc had thought that Article 36 did not require immediate notification, they would have said so. They did not.

182. The lack of any temporal definition of "without delay" in Article 36(1)(b), lends further support to the conclusion that notification must be immediate. At the conference, Germany's delegate proposed an amendment by which the "without undue delay" language would have been retained, but qualified by the words "but at the latest within one month."[200] When discussion in the committee made it clear that other states were not willing to allow so long a period to pass without notification, Germany revised its own amendment to change "thirty

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[198] *See Official Records*, Proposals and Amendments Submitted to the Second Committee, at 85, United Kingdom: Amendments to Article 36, 13 March 1963, A/CONF.25/C.2/L.107 (proposal to delete "undue" submitted to the Second Committee); *see also Official Records*, Vol. I, p. 337 (statement of the United Arab Republic) (supporting the United Kingdom's proposal).

[199] Official Records, Vol. I: U.N. Conference on Consular Relations 37, U.N. Doc. A/CONF.25/16 (1963) (Statement of the U.S.S.R.) (emphasis added).

[200] U.N. Doc. A/CONF.25/C.2/L.74, in Official Records, Vol. II: U.N. Conference on Consular Relations 81, U.N. Doc. A/CONF.25/16/Add.1 (1963).

days" to "forty-eight hours."[201] In this revised form, the amendment was put to a vote. Even the forty-eight hour qualification was rejected.[202]

183. The delegates obviously chose to require notification "without delay" rather than specify a particular time period, so as to accommodate the object and purpose of Article 36 of prompt, effective consular protection within the context of the diversity of legal systems that exist among the States party.[203] A specific time period could be ineffective in preventing injury to a foreign national where different municipal systems permitted or required interrogation, court proceedings or other similar actions to be taken in the time prior to the expiration of such a set period. While notification within the forty-eight hours proposed by Germany may ordinarily be understood to constitute notification "without delay," if interrogation takes place immediately after apprehension or detention, even a delay of several hours may violate the purpose and intent of Article 36.

184. By rejecting a 48-hour grace period and deleting "undue" the states participating in the conference made clear that "without delay" meant with *no* delay. Notification pursuant to Article 36(1)(b) must take place at the time the national is first detained.

185. Although the United States has stated that notice within 24 to 72 hours would generally be considered without delay,[204] the U.S.

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[201] Official Records, Vol. II: U.N. Conference on Consular Relation 131, U.N. Doc. A/CONF.25/16/Add.1 (1963).

[202] Official Records, Vol. II: U.N. Conference on Consular Relation 131, U.N. Doc. A/CONF.25/16/Add.1 (1963).

[203] Article 36 was designed to ensure prompt consular notification and assistance in the context of "an international convention on consular relations, privileges and immunities [that] would . . . contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems." *Id.*, pmbl.

[204] U.S. Department of State telegram to all U.S. diplomatic and consular posts abroad concerning consular assistance for American nationals abroad, para. 4, January 1, 2001, available at <http://www.travel.state.gov/notification3.html> (last visited 14 June, 2003).

Department of State has always understood "without delay" to require immediacy, in a qualitative sense, rather than within a certain number of hours or days.

186. The *Foreign Affairs Manual* of the U.S. Department of State explains quite clearly why "[p]ractical considerations make it imperative that the consular officer be notified *immediately* by local authorities whenever a U.S. citizen is arrested."[205] Such immediate notification is essential to the whole regime of effective and meaningful consular protection:

> In order for the consular officer to perform the protective function in an efficient and timely manner, it is essential that the consul obtain prompt notification whenever a United States citizen is arrested. Prompt notification is necessary to assure early access to the arrestee. Early access in turn is essential, among other things, to receive any allegations of abuse [and] to provide a list of lawyers and a legal system fact sheet to prisoners. . . . Without such prompt notification of arrest, it is impossible to achieve the essential timely access to a detained U.S. citizen.[206]

187. Moreover, the actual practice of the United States in serious cases has been to insist on notification and access without *any* delay for its detained nationals, in order to facilitate consular assistance from the earliest stages of the detention. For instance, in 1977, two American missionaries were detained by Salvadoran authorities for taking a photograph of a police station, which was deemed to be a "national security installation" during a "state of siege." The United States did not wait for an arbitrary deadline to expire before responding. Although the authorities released the individuals after 32 hours of detention, the State Department nevertheless lodged a protest note requesting the Salvadoran Minister of Foreign Relations to "elaborate expeditiously" as to

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[205] U.S. Dep't of State, 7 *Foreign Affairs Manual* 400 (emphasis added), Annex 28.

[206] *Id.* at §§ 411, 411.3.

> [w]hy the . . . two United States citizens were not informed of their right to contact the Consulate as provided under Article 36 of the Vienna Convention on Consular Relations of 1963; and why the Consulate was not officially informed of the detention of two United States citizens until approximately 28 hours afterwards.[207]

188. U.S. federal policies and regulations also confirm that "without delay" requires immediate notification with respect to foreign nationals within the United States. For instance, a 1986 notice issued by the U.S. Department of State to law enforcement agencies nationwide regarding the Vienna Convention and the arrest of foreign nationals reads in pertinent part:

> The arresting official should in all cases *immediately* inform the foreign national of his right to have his government notified concerning the arrest/detention.
>
> If the foreign national asks that such notification be made, you should do so *without delay* by informing the nearest consulate or embassy.[208]

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[207] L. Lee, *Consular Law and Practice* (2d ed. 1991), at p. 149 (quoting U.S. Dep't of State, File No. P77 0095-2225; Dept. of State Digest, 1977, at 290).

[208] United States Department of State Notice, October, 1986 (emphasis added). Similarly, since 1967, Department of Justice regulations have provided that: "In every case in which a foreign national is arrested *the arresting officer shall inform the foreign national* that his consul will be advised of his arrest unless he does not wish such notification to be given." Notification of Consular Officers upon the arrest of foreign nationals, 28 C.F.R.§ 50.5 (1) (emphasis added). Likewise, since 1968, U.S. military regulations have stressed the need for immediate consular notification whenever a foreign national is arrested:

> When a circumstance requiring notification occurs, the *notifying officer will immediately communicate* by telegram directly with the consul of the foreign country concerned nearest the locale in which the circumstances requiring notification occur.

Consular Protection of Foreign Nationals Subject to the Uniform Code of Military Justice, AR 27-52, 5 November 1968 (emphasis added).

189. Certain state laws and regulations of the United States are even more specific. For instance, since 1999, all police officers in California have been required to provide immediate notification of consular rights:

> In accordance with federal law and the provisions of this section, every peace officer, *upon arrest and booking or detention for more than two hours* of a known or suspected foreign national, shall advise the foreign national that he or she has a right to communicate with an official from the consulate of his or her country....[209]

190. Finally, the United States has recently affirmed in federal court that *immediate* notification of consular rights is required under Article 36. During a recent oral argument before the U.S. Court of Appeals for the First Circuit, the following colloquy took place:

> The Court: Does it [the Vienna Convention] require that the individual be notified *immediately*?

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[209] Cal. Penal Code § 834c (a) (1) (1999). *See also* Georgia Department of Community Affairs, *A Model Law Enforcement Operations Manual*, chapter 8-1, *Sixth Edition*, Revised February 1996, *available at*: <http://www.dca.state.ga.us/research/law/Chap8-1.html> (last visited 10 June 2003). ("A foreign national who is arrested (taken into custody) will be informed that he or she has the right under a treaty to which the United States is a party, to have his or her country's embassy or nearest consulate notified of his or her arrest and detention. *This should be done at the time of the arrest* but no later than during booking at the jail.") (emphasis added).

Similarly, the New York Police Department requires the arresting officer to "[I]nform prisoner of right to have embassy or consulate notified" and requires the desk officer to "ensure that arresting officer" has carried out departmental procedures whenever "notification to the prisoner's embassy or consulate is required or in other cases when an arrested alien has so requested." *NYPD Patrol Manual*, Procedure No. 208-56 (Date Effective: 02-28-01).

> Government Counsel: *Well, yes it does*. There is no question that this treaty was violated in this instance and the United States is not saying that it wasn't violated.[210]

b. Specifically, Without Delay Means Before Interrogation of the Foreign National.

191. The States party to the Convention obviously appreciated that under custodial circumstances, even a minor delay could cause irreparable prejudice to the rights of a foreign national. Without immediate notification and access, consular officers will be prohibited from performing their most basic functions to protect their most vulnerable nationals – those in the custody of a foreign state. Accordingly, Article 36 requires notification and access *without delay* to enable meaningful consular assistance.

192. As the U.S. Department of State advises its foreign service staff: "[p]rompt personal access . . . provides an opportunity for the consular officer to explain the legal and judicial procedures of the host government and the detainee's rights under that government *at a time when such information is most useful.*"[211]

193. As discussed in Chapter Two, the most important aid a consular official can render comes at the outset of a criminal proceeding.

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[210] *United States v. Li*, 206 F.3d 56, 69 (1st Cir. 2000) (Torruella, C.J., dissenting) (emphasis added).

[211] U.S. Dep't of State, 7 *Foreign Affairs Manual* § 412 (emphasis added), Annex 28. In a letter to the Chairman of the Texas Board of Pardons and Paroles, on 27 November 1998, Former Secretary of State Madeline Albright summarized the thrust of the United States's consular assistance program for its nationals detained abroad thus:

> We assist by attempting to ensure that [detainees] understand the foreign country's legal system and their legal options, by helping them obtain qualified legal representation, by communicating with their families if they wish, and by taking other steps to improve the prisoner's situation and in some cases, to influence the outcome of the proceedings.

Correspondence with M. Albright, , Annex 29.

The assistance of qualified legal counsel is crucially important from the first moment of detention,[212] as is a working understanding of the local legal system. [213] Consuls are entitled to provide assistance with both. Therefore, just as countries recognize that a detainee must have immediate access "without delay" to legal advice prior to making any statement to authorities,[214] it is equally manifest that consular notification

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[212] The Human Rights Committee has stated that "all persons who are arrested must have immediate access to counsel." *Concluding Observations of the HRC: Georgia*, U.N. Doc. CCPR/C/79/Add.74, 9 April 1997, para. 28. The Inter-American Commission has stated that the right to defend oneself requires that an accused person be permitted to obtain legal assistance when first detained. *Annual Report of the Inter-American Commission, 1985-1986*, OEA/Ser.L/V/II.68, doc. 8 rev. 1, 1986, p. 154, El Salvador. *See also Murray v. United Kingdom*, (41/1994/488/570), 8 February 1996. paras. 40-70 (failure to grant access to counsel during the first 48 hours after his arrest was a violation of Article 6 of the European Convention on Human Rights).

[213] For this reason, "[a]ny person shall, *at the moment of arrest and at the commencement of detention* or imprisonment, or promptly thereafter, be provided by the authority responsible for his arrest, detention or imprisonment, respectively, *with information on and an explanation of his rights* and how to avail himself of such rights." Principle 13, *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, G.A. res. 43/173, annex, 43 U.N. GAOR Supp. (No. 49) at 298, U.N. Doc. A/43/49 (1988) (emphasis added).

[214] Many national constitutions require all detained persons to have access to counsel and advice about their legal rights "without delay." For example, Section 23(1)(b) of the New Zealand Bill of Rights Act (1990) states that every detained or arrested person "shall have the right to consult and instruct a lawyer *without delay* and to be informed of that right." Similarly, Section 10 (b) of the Canadian Charter of Rights and Freedoms (1982) declares that everyone has the right on arrest or detention "to retain and instruct counsel *without delay* and to be informed of that right" (emphasis added).

In construing the precise meaning of "without delay" in this context, the Supreme Court of Canada has explained that:

> A detainee is advised of the right to retain and instruct counsel without delay because it is *upon arrest or detention* that a detainee is faced with an *immediate* need for legal advice, *especially in respect of how to exercise the right to remain silent.*

and access must occur immediately upon detention and prior to any interrogation of the foreign detainee, so that the consul may offer useful advice about the foreign legal system and provide assistance in obtaining counsel before the foreign national makes any ill-informed decisions or the State takes any action potentially prejudicial to his rights.[215]

194. Accordingly, in *The Right to Information on Consular Assistance in the Framework of the Guarantees of Due Process of Law*,[216] the Inter-American Court of Human Rights concluded that

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R. v. Brydges, [1990] 1 S.C.R. 190, at p. 191 (emphasis added).

The Court of Appeal for Western Samoa reached precisely the same construction of the term "without delay" in that country's Constitution:

> Although there was no express requirement to inform the arrested person promptly of the right to consult counsel, this obligation was to be implied into Art 6(3) of the Constitution which provided inter alia that every person who is arrested shall be allowed to consult a legal practitioner of his own choice *without delay*... If the right to counsel was to be effective, the information had to be conveyed *before any statement was taken* and it should be made clear that if the person arrested wished to consult a lawyer, any questioning would be *deferred for a reasonable time* to enable the person to obtain legal advice.

Attorney-General v U, Western Samoa, Court of Appeal, 5 May 1994 1 HRNZ 286; [1996] 1 CHRLD 96 (emphasis added).

[215] As one English judge noted in the case of two Lebanese nationals, the notification obligation provides "a protection of fundamental importance." The court noted that had consular notification taken place,

> a French or Arabic speaking official would have visited the defendants in the police station at short notice. Such a person would have helped them to reach an informed decision about their position, and might well have advised them to obtain the services of a solicitor and an interpreter *before being interviewed*.

R. v. Bassil and Mouffareg (1990) 28 July, Acton Crown Court, HHJ Sich. Reported in *Legal Action* 23, December 1990 (emphasis added).

[216] Advisory Opinion OC-16/99 of 1 October 1999, Series A, No. 16.

because the Vienna Convention's drafters intended Article 36(1), among other goals, to ensure the efficacy of a foreign national's legal defense, "notification must be made at the time the accused is deprived of his freedom, or *at least before he makes his first statement before the authorities.*"[217]

195. The Inter-American Commission also concluded that consular notification "after crucial preliminary stages of [a foreign] national's criminal proceedings [have] transpired, including the retaining of his attorney, the presentation of the charges against him and the development of his defense" would fail to satisfy the mandate of "without delay."[218]

196. Irrespective of self-serving arguments formulated exclusively for the purpose of litigating the Vienna Convention before this Court in *LaGrand*,[219] with respect to U.S. nationals detained abroad, the United States has always understood the purpose of the consular notification right and the necessity of notification prior to interrogation and other prejudicial acts by the receiving state.

197. Certainly, the view adopted for purposes of the *LaGrand* litigation cannot be reconciled with the views previously expressed by the United States. The U.S. Department of State has acknowledged the functional definition of "without delay" meaning prior to interrogation, stating:

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[217] *Id.*, para. 106 (emphasis added).

[218] *See* Inter-American Commission on Human Rights Report No. 52/02, Merits, Case 11.753, (*Ramón Martinez Villareal v. United States*) (10 October 2002).

[219] *LaGrand*, Memorial of the United States of America, para. 84:

> ...nothing in Article 36 relates [a State's] notification obligations to the criminal justice process. Article 36 provides that both notification obligations must be carried out 'without delay,' but does not define this term or relate it to any particular event in the criminal justice process. Nor does Article 36 specify the *manner* in which consular officers must be notified, leaving it open to States party [to the Convention] to use a variety of methods, including ones that result in notification occurring after critical events in a criminal investigation have occurred.

> While there is no precise definition of "without delay," it is the Department's view that such notification should take place as quickly as possible and, in any event, no later than the passage of a few days. Serious problems in this regard have been experienced by American consular officers in countries in Eastern Europe, where . . . detention of an individual for prolonged "interrogation" prior to the filing of formal charges is officially sanctioned. . . . Clearly this type of procedure is not in keeping with either the letter or the spirit of the Vienna Convention.[220]

198. Similarly, in Congressional hearings in 1975 regarding American citizens in prison in Mexico, the administration of security and consular affairs for the Department of State testified:

> We believe that immediate consular access is the linchpin on which hangs in large measure the solution of many of our problems. With early access to each prisoner we are convinced we can go a long way toward guaranteeing the prisoner against mistreatment and forced statements at the time of arrest, along with making available to him information about responsible legal counsel and judicial procedures.[221]

199. Moreover, the United States responds vigorously when its nationals have faced interrogation without the benefit of consular assistance. On 29 August 2001, the United States Embassy in Belarus issued a formal statement on the case of Robert Fielding. Noting that Mr. Fielding had been arrested and subjected to a 10-hour interrogation and then subsequently deported, the Embassy stated:

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[220] U.S. Dep't of State File L/M/SCA, 1973 Dep't of State Digest 161, *quoted in* Lee, *supra*, at pp. 143- 144.

[221] U.S. Citizens Imprisoned in Mexico: Hearings before the Subcommittee on International Political and Military Affairs of the House Committee on International Relations, 94th Cong., 1st Sess. Part II, at 6 (1975). (*Statement of Hon. Leonard F. Walentrynoucz, Bureau of Security and Consular Affairs, Department of State*). U.S. Citizens Imprisoned in Mexico: Hearings before the Subcommittee on International Political and Military Affairs of the House Committee on International Relations, 94th Cong., 1st Sess. Part II, at 37 (1975) (*Letter from Hon. Robert J. McCloskey, Assistant Secretary of State for Congressional Relations to Hon. Dante B. Fascell, Dated November 26, 1975*).

During this entire interrogation process, he was denied the right to legal counsel, forced to sign a statement, and subjected to being filmed by the state-controlled Belarusian National ... The U.S. Embassy would like to emphasize the following: The Government of Belarus is a signatory to the Vienna Convention on Consular Relations which assures notification, without delay, of home-country consular officers in cases where a foreign national is detained. The Government of Belarus acted with extraordinary haste to see that Mr. Fielding was deported before he could see a U.S. consular officer... By taking the extraordinary action of detaining and harassing an American citizen apparently for the sole purpose of creating a propaganda piece for the state-controlled Belarusian National Television, the Government has raised serious questions about its intentions.[222]

c. The Vulnerability of Foreign Nationals in Custody Requires the Definition that Mexico Urges.

200. The necessity of construing "without delay" to mean prior to interrogation of a detained foreign national is reinforced by the vulnerability of foreign nationals in custody.

201. Reports and documentation repeatedly show that the greatest potential for abuse by authorities exists at the time of initial custody and detention.[223] Indeed, in the landmark decision *Miranda v. Arizona*,[224] the

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[222] *Embassy Statement on Detention and Deportation of U.S. Citizen Robert Fielding*, Embassy of the United States of America, Minsk, Belarus, *available at* < http://www.usis.minsk.by/html/fielding.html> (last visited 10 June 2003).

[223] *See, e.g.*, Amnesty International, Torture Worldwide: An Affront to Human Dignity 12-13 (2000) (Criminal suspects are one of the most common victims of torture used to obtain information or extract confessions); *Civil and Political Rights, Including the Questions of Torture and Detention: Report of the Special Rapporteur, Sir Nigel Rodley*, U.N. Commission on Human Rights, 56th Sess., Provisional Agenda Item 11(a), ¶ 11, U.N. Doc E/CN.4/2000/9/Add.3 (2000) (Criminal suspects are most at risk of being subjected to torture or other ill-treatment in early phases of detention); N. S. Rodley, The Treatment of Prisoners Under International Law10-11 (2nd ed. 1999) (torture frequently used on ordinary criminal suspects immediately after being seized in order to secure confessions and other information); D. Lohman, Human Rights Watch, Confessions at any Cost: Police Torture in Russia (1999) (torture of detained

United States Supreme Court cited a police manual that illustrates the dangers inherent in custodial interrogation. The manual explained how best to elicit confessions, emphasizing how the conditions of custodial interrogation are conducive to the solicitation of confessions:

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persons is reportedly rampant in Russia); Amnesty International, United States of America: Police Brutality and Excessive Force in the New York City Police Department 9-10 (1996) (persons reportedly tortured by New York City police officers during course of arrest, during disputes, or in transport to station). Reports of Sir Nigel Rodley, Special Rapporteur to the [Torture Convention Committee] detail specific instances of police brutality during pre-trial custody in order to obtain confessions. *See, e.g., Civil and Political Rights, Including the Questions of Torture and Detention: Report of the Special Rapporteur, Sir Nigel Rodley*, U.N. Commission on Human Rights, 57th Sess., Provisional Agenda Item 11(a), ¶ 6-9, 22, 114 U.N. Doc E/CN.4/2001/66/Add.1 (2001) (describing pre-trial custodial torture in order to extract confessions by law enforcement officials in Azerbaijan,); *Civil and Political Rights, Including the Questions of Torture and Detention: Report of the Special Rapporteur, Sir Nigel Rodley*, U.N. Commission on Human Rights, 57th Sess., Provisional Agenda Item 11(a), ¶¶ 7-9, 17, 56, U.N. Doc E/CN.4/2001/66/Add.2 (2001) (custodial torture by police reportedly endemic in Brazil); *Civil and Political Rights, Including the Questions of Torture and Detention: Report of the Special Rapporteur, Sir Nigel Rodley*, U.N. Commission on Human Rights, 56th Sess., Provisional Agenda Item 11(a), ¶ 5, U.N. Doc E/CN.4/2000/9/Add.2 (2000) (describing custodial torture in Cameroon to extract confessions or to punish or intimidate individuals suspected of having committed crimes); *Civil and Political Rights, Including the Questions of Torture and Detention: Report of the Special Rapporteur, Sir Nigel Rodley*, U.N. Commission on Human Rights, 56th Sess., Provisional Agenda Item 11(a), ¶ 6, U.N. Doc E/CN.4/2000/9/Add.3 (2000) (describing custodial torture by police in Romania to extract confessions or to punish criminal suspects); *Civil and Political Rights, Including the Questions of Torture and Detention: Report of the Special Rapporteur, Sir Nigel Rodley*, U.N. Commission on Human Rights, 56th Sess., Provisional Agenda Item 11, ¶¶ 6, 11, U.N. Doc E/CN.4/2000/9/Add.4 (2000) (describing torture used almost systematically to obtain confessions in Kenya); *Civil and Political Rights, Including the Questions of Torture and Detention: Report of the Special Rapporteur, Sir Nigel Rodley*, U.N. Commission on Human Rights, 55th Sess., Provisional Agenda Item 11(a), ¶ 14, U.N. Doc E/CN.4/1999/61/Add.1 (1999) (security forces carrying out interrogations in Turkey avoid visible signs of torture by using less brutal forms of torture).

[224] 384 U.S. 436 (1966).

> If at all practicable, the interrogation should take place in the investigator's office or at least in a room of his own choice. The subject should be deprived of every psychological advantage. In his own home he may be confident, indignant, or recalcitrant. He is more keenly aware of his rights and more reluctant to tell of his indiscretions of criminal behavior within the walls of his home. Moreover his family and other friends are nearby, their presence lending moral support.[225]

202. These facts apply *a fortiori* to foreign nationals who, far more than citizens detained by their own government, will find themselves, "thrust into an unfamiliar atmosphere and run through menacing police interrogation procedures."[226]

203. In the words of the United States: "Immediate consular access, in [the Department of State's] opinion, still remains the restraining factor preventing abusing treatment [in prison], and we continue to pursue that goal[.]"[227]

204. In sum, there can be no dispute that none of the objectives of Article 36(1)(b) can be achieved with appropriate effect (*effet utile*) unless compliance takes place literally "without delay," in other words, immediately and prior to any interrogation. It is also evident that the

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[225] *Id.* at 449-50 (quoting Inbau & Reid, *Criminal Interrogation and Confessions* (1962), p. 1 (internal quotation marks omitted); *see also id.* at pp. 448-56 (canvassing the range of interrogation techniques used by police officers to elicit confessions).

[226] *Id.* at 457. The U.S. Supreme Court further observed that foreign law had likewise recognized the dangers of custodial interrogation. *See id.* at 487-89 (discussing the law and practice of Scotland, England, and Ceylon).

[227] U.S. Citizens Imprisoned in Mexico: Hearings before the Subcommittee on International Political and Military Affairs of the House Committee on International Relations, 94th Cong., 1st Sess., Part II, at 58 (1975) (*Statement of Hon. Leonard F. Walentynowicz, Administrator, Bureau of Security and Consular Affairs, Department of State*); *see also id at 37* (*Letter from Robert J. McClosky, Asst. Sec. Of State for Congressional Relations to Hon. Dante B. Rascell, dated Nov. 26, 1975)* ("prompt consular access offers the best hope of effective deterrence of abuse during interrogation.").

United States routinely applies these same principles on behalf of its nationals detained abroad.

2. The United States Did Not Provide the Requisite Notice Without Delay To Any of the Fifty-Four Mexican Nationals.

205. The record in this case clearly establishes that the United States provided no notice whatsoever to fifty-one Mexican nationals who were convicted and sentenced to death in the United States. The United States – through the relevant municipal prosecuting authorities or through judicial findings – has conceded many of these violations; the others cannot be disputed.[228]

206. The record in this case also clearly establishes that even in the three cases where the United States did notify the detained Mexican nationals of their rights under Article 36, such notice either was not conveyed "without delay," or failed to notify the detained national of all his rights, as required by the plain language of Article 36(1)(b).[229]

207. Failure to provide the notice required by Article 36(1)(b) constitutes a violation of the "individual rights" of each detained foreign national, as established by this Court in *LaGrand*.[230] In fact, the failure to notify a national of his rights — and thereafter to notify that national's consulate upon request — without delay, eviscerates the entire purpose of Article 36(1). If a receiving State fails to comply with its obligations under Article 36(1)(b), a foreign national seldom will be aware of or in a position to exercise his right to contact his consular officer.

208. Equally, by failing to notify the detained Mexican nationals of their Article 36 rights, the United States necessarily also violated Mexico's right to provide consular assistance pursuant to subparagraphs (a) and (c). As this Court held in *LaGrand*, "when the sending State is unaware of the detention of its nationals due to the failure of the

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[228] *See supra* Chapter III.3.B.

[229] *See supra* Chapter III.3.B.

[230] *LaGrand*, para. 77.

receiving State to provide the requisite consular notification without delay, . . . the sending State has been prevented for all practical purposes from exercising its rights under Article 36, paragraph 1."[231]

B. BY APPLYING ITS MUNICIPAL LAW IN A MANNER THAT FAILS TO GIVE FULL EFFECT TO THE PURPOSE OF ARTICLE 36, THE UNITED STATES HAS VIOLATED, AND CONTINUES TO VIOLATE, ARTICLE 36(2) OF THE VIENNA CONVENTION.

209. The United States violated Article 36(2) by invoking municipal laws to preclude judicial remedies for violations of Article 36(1). In particular, the United States has used its municipal default doctrines and its judicial findings that Article 36 does not create fundamental individual rights to bar Mexican nationals from challenging their convictions and death sentences on the basis that they were not notified pursuant to Article 36(2) of their right to contact their consulates.

210. Moreover, the United States has informed Mexico and this Court that because U.S. courts are barred by these municipal doctrines from considering Vienna Convention violations, it "has elected to rely on the clemency process in the specific cases that have arisen since *LaGrand* . . . [as] the surest and most effective way to take account of the violation of the Vienna Convention rights."[232] But, the discretionary clemency process – which rarely, if ever, includes a review and reconsideration of the effect of a violation of the Vienna Convention – cannot remedy the United States's failure to give full effect to the purposes of Article 36.

211. The United States's elevation of its municipal law and federalist structure over its treaty obligation to give "full effect" to the purposes of Article 36 is a violation of international law and constitutes a separate breach of its obligations under the Vienna Convention.

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[231] *LaGrand*, para. 74.

[232] CR 2003/4 (Collins), at p.16.

1. The United States Was Obligated to Give Full Effect to the Purposes of Article 36 in its Municipal Law To Enable the Effective Enforcement and Meaningful Vindication at Law of Those Consular Rights.

212. The drafters of the Vienna Convention envisioned "an international convention on consular relations, privileges and immunities [that] would . . . contribute to the development of friendly relations among nations, *irrespective of their differing constitutional and social systems*."[233]

213. It was an essential task for the drafters to accommodate the myriad legal systems among the States party to the Convention, while at the same time protecting against States using their municipal laws to undermine the rights established in Article 36. To permit a State's laws and regulations to impair or diminish rights conferred by the Convention would defeat the object and purpose of Article 36(2) and violate the fundamental principle of international law that no state may invoke its municipal law or internal structure to excuse or justify failure to obey international law.[234]

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[233] *Id.*, pmbl. (emphasis added).

[234] *See, e.g., Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports* 1949, at p. 180 (emphasizing that where a "claim is based on the breach of an international obligation on the part of [a] Member [State], the Member [State] cannot contend that this obligation is governed by municipal law"); *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory, Advisory Opinion, 1932 P.C.I.J., Series A/B, No. 44*, p. 4 ("[A] State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force."); *Free Zones of Upper Savoy and the District of Gex, Order of 6 December 1930, P.C.I.J., Series A, No. 24*, p. 12 (observing that a State "cannot rely on [its] own legislation to limit the scope of [its] international obligations"). *See also* International Law Commission, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, Art. 3, ("The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law"); *Oppenheim's International Law*, pp. 500-01. International Law Commission, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, Art. 4 ("The

214. In order to strike that balance, Article 36(2) of the Vienna Convention provides:

> The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.[235]

215. The *travaux préparatoires* for the Vienna Convention, in particular the revision of the text of Article 36(2), clearly reveal the understanding of the States party of the meaning of "full effect." The ILC's Draft Articles on Consular Relations, which served as the basis for negotiations of the final text of the Convention, had provided in full:

> The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations *must not nullify* these rights.[236]

216. The United Kingdom proposed an amendment to this provision, which was ultimately accepted as the final text of Article

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conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State"); *see also* Vienna Convention on the Law of Treaties, 23 May 1963, art. 27, 1155 U.N.T.S. 331. ("A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty").

[235] Vienna Convention, art. 36(2).

[236] *Draft Articles on Responsibility of States for intentionally wrongful acts*, adopted by the International Law Commission at its Fifty-third session (2001), Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10 (A/56/10), Chp. IV.E.1, art. 36(2), (emphasis supplied) [hereafter "ILC Draft Articles"].

36(2), precisely because the ILC version did not, in its view, *go far enough*.[237]

217. The United Kingdom's delegate emphasized that "'to nullify' mean[s] to 'render completely inoperative.' But [the] rights [established by Article 36(1)] could be seriously impaired without becoming completely inoperative."[238] For example, while a sending State's "consulates must comply with laws and regulations on such matters as prison visiting and what might be given to the prisoner," "it was of the greatest importance . . . that the *substance* of the rights and obligations in paragraph 1 . . . be preserved."[239] Other State delegates agreed. Not only should municipal laws and regulations not "nullify" the rights in Article 36(1), they should not in any way impair the efficacy of those rights.

218. The Soviet delegation, supported by the Byelorussian and Romanian delegates, sought to resurrect the ILC version because it "recognized that national jurisdiction should not be interfered with, and ... established a satisfactory balance between the consul's right to protect his nationals and the requirements of municipal law in the receiving State."[240] As the Soviet delegate further pointed out, the approved version of Article 36(2) "could have serious consequences for the receiving State where an alien committed a crime."[241] The Soviet bloc feared the U.K. amendment could require changes in domestic criminal

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[237] *Official Records*, Proposals and Amendments Submitted to the Second Committee, at 85, United Kingdom: Amendments to Article 36, 13 March 1963, A/CONF.25/C.2/L.107.

[238] *Official Records*, Vol. I, p. 40 (statement of the United Kingdom).

[239] *Official Records*, Vol. I, p. 347 (statement of the United Kingdom).

[240] United Nations, Official Records of the Conference on Consular Relations, Vol. I, Twelfth Plenary Meeting, agenda item 10, para. 3, document A/CONF.25/16; see also id. para. 8 and Eleventh Plenary Meeting, agenda item 10, para. 26.

[241] *Id*, para. 4.

laws and procedures. After the consideration of these concerns, the U.K. amendment to Article 36(2) prevailed.[242]

219. Thus, the language of Article 36(2) maximizes the flexibility that each State enjoys to integrate those rights and obligations into its particular system of municipal law. But in no event can that flexibility become a pretext for diminishing or impairing the rights conferred by Article 36(1); in no event can the means chosen (*how* a State elects to give full effect) eviscerate the end required (that its laws and regulations *do in fact* give full effect).

220. In *LaGrand*, the Court had occasion to interpret the requirements of the obligation established by Article 36(2) to give "full effect to the purposes" for which Article 36 was intended. With respect to German nationals who were "convicted and sentenced to severe penalties" without having been afforded their rights to consular notification and communication, the Court held, *first*, that a State violates Article 36(2) when it gives effect to a law or regulation that

> does not allow [a detained foreign national of the sending State] to challenge a conviction and sentence by claiming, in reliance on Article 36, paragraph 1, of the Convention, that the competent national authorities failed to comply with their obligation to provide the requisite consular information "without delay," thus preventing the person from seeking and obtaining consular assistance from the sending State.[243]

221. *Second*, the Court held that a receiving State violates Article 36 when it gives effect to a law or regulation that prevents the authorities of

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[242] *Official Records*, Vol. I, p. 348.

[243] *LaGrand, Judgment of 27 June 2001*, para. 90; *cf.* Vienna Convention on Consular Relations *(Paraguay v. United States of America), I.C.J. Reports 1998, Order of 9 April*, Declaration of President Schwebel ("It is of obvious importance to the maintenance and development of a rule of law among States that the obligations imposed by treaties be complied with and that, where they are not, reparation be required.").

that State "from attaching any significance to the fact [of] the violation."[244]

222. *Third*, in the case of such a conviction and sentence, the Court imposed an obligation on the United States "to allow the review and reconsideration" of both the conviction and the sentence where rights to consular access were violated.[245] The Court specifically instructed the United States that the review and reconsideration had to "tak[e] account of the violation of the rights set forth in the Convention."[246]

223. *Finally*, by holding that the United States had the "choice of means," the Court left the implementation of these concrete obligations to the United States.

224. In *LaGrand*, the Court considered Article 36(2) in the context of the United States municipal-law doctrine of procedural default. As discussed in Chapter Two, pursuant to that doctrine, a defendant who could have raised, but fails to raise, a legal issue at trial will generally not be permitted to raise it in future proceedings, on appeal or in a petition for a writ of *habeas corpus*. Because application of the procedural default doctrine *(i)* prevented the LaGrand brothers (nationals of the sending State) from challenging their convictions and sentences in reliance on Article 36(1), and *(ii)* prevented the courts (authorities of the receiving State) from attaching significance to the fact of the violations, the Court held that the United States had "breached its obligation" to Germany and the LaGrand brothers (German nationals) "under Article 36, paragraph 2, of the Convention."[247] The Court thereby affirmed its authority to hold, "[i]f necessary, that a domestic law has been the cause of th[e] violation."[248]

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[244] *Id.*, para. 91.

[245] *Id.*, para. 125.

[246] *Id.*, paras. 125, 128(7).

[247] *Id.*, para. 128(4).

[248] *Id.*, para. 125.

225. Although the *LaGrand* judgment is binding only between the United States and Germany, the Court's holding with respect to the "obligations of the United States in cases of severe penalties imposed on German nationals" who were not accorded their rights under Article 36 has clear relevance for Mexico, as well. In a separate declaration President Guillaume stated:

> subparagraph (7) [of the dispositif] does not address the position of nationals of other countries or that of individuals sentenced to penalties that are not of a severe nature. However, in order to avoid any ambiguity, it should be made clear that there can be no question of applying an *a contrario* interpretation to this paragraph.[249]

2. The United States Has Violated Article 36(2) by Foreclosing Legal Challenges to Convictions and Death Sentences of Mexican Nationals Resulting from Proceedings That Failed to Respect Article 36(1) of the Convention.

226. By applying provisions of its municipal law to defeat or foreclose remedies for the violation of rights conferred by Article 36 – thus failing to provide meaningful review and reconsideration of severe sentences imposed in proceedings that violated Article 36 – the United States has violated, and continues to violate, the Vienna Convention.

227. The United States uses several municipal legal doctrines to prevent finding any legal effect from the violations of Article 36. *First*, despite this Court's clear analysis in *LaGrand,* U.S. courts, at both the state and federal level, continue to invoke default doctrines to bar any review of Article 36 violations – even when the national had been unaware of his rights to consular notification and communication and thus his ability to raise their violation as an issue at trial, due to the competent authorities' failure to comply with Article 36.

228. In the case of Ramiro Ibarra Rubí,[250] although state officials conceded both "that he is a citizen of Mexico and that he was never

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[249] *Id.*, Decl. Guillaume.

[250] Case no. 34 in Mexico's Application.

informed of or accorded his right to free access to and consultation with the consular post of Mexico,"[251] the Texas Court of Criminal Appeals applied the state procedural default doctrine and refused to consider Mr. Ibarra's claim that the detaining authorities had failed to notify him of his rights under Article 36 of the Vienna Convention:

> We need not decide the merits of appellant's contention, however, as he failed to preserve this issue for review. [Texas] Rule of Appellate Procedure 33.1, Preservation of Appellate Complaints, requires that the record show the complaint was timely made to the trial court, the grounds were specifically stated or were readily apparent, the complaint complied with the rules of evidence or appellate procedure, and the requirement of a ruling on the complaint be satisfied. Except for complaints involving fundamental constitutional systemic requirements, which are not applicable here, all other complaints based on a violation of both constitutional and statutory rights are waived by failure to comply with Rule 33.1.[252]

229. The court made no exception for the fact that Article 36 violations consist of a failure of the authorities to notify defendants of their rights.

230. As this Court is aware, the federal procedural default rule works in a similar fashion. Once a state court determines a Mexican national's Article 36 claim to have been defaulted because it was not raised at the trial level, the federal courts reviewing cases from these states will defer to that default finding and will therefore refuse to consider the merits of the underlying claim. [253]

231. The federal procedural default rule is subject to several limited exceptions; however, the application of these exceptions reveals the

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[251] *Ibarra v. State*, 11 S. W .3d 189, 197 (Tex. Crim. App. 1999).

[252] *Id. (internal citations omitted).*

[253] *See, e.g., Murphy v. Netherland*, 116 F.3d 97, 100 (4th Cir. 1997); Annexes 39-65 (containing court decisions in the cases of Mexican nationals which apply the procedural default rule).

extent to which the United States misconceives of the importance of the rights created by Article 36 and fails to give them full effect. An inmate seeking a federal writ of *habeas corpus* can overcome a state procedural default if he can demonstrate "cause for the default and prejudice attributable thereto, or demonstrate that failure to consider the federal claim will result in a fundamental miscarriage of justice."[254] "Cause" sufficient to excuse a state procedural default requires the inmate to prove "that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule."[255] 'Prejudice' means proof "not merely that the errors at his trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions."[256] And 'miscarriage of justice' means "the conviction of one who is actually innocent."[257]

232. Federal courts have held that Vienna Convention claims do not satisfy any of these exceptions.[258] Just as the Texas Court of Criminal Appeals refused to make an exception for state procedural default rules for Mr. Ibarra's claim because it did not consider Article 36 a "fundamental constitutional systemic requirement," so too no court has ever found, and no prosecutor has ever agreed, that failure to consider a defaulted Vienna Convention claim would cause "prejudice" or would work a "miscarriage of justice."

233. Likewise, federal courts have specifically "rejected [the] contention that the novelty of a Vienna Convention claim and the state's failure to advise the [foreign national] of his rights under the Vienna

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[254] *Harris v. Reed*, 489 U.S. 255, 262 (1989)(*internal citations omitted*), *emphasis added.*

[255] *Murray v. Carrier*, 477 U.S. 478, 488 (1986).

[256] *United States v. Frady*, 456 U.S. 152, 170 (1982).

[257] *Carrier*, 477 U.S. at 496.

[258] *See, e.g., LaGrand v. Stewart*, 133 F.3d 1253, 1261 (9th Cir. 1998) ("It is undisputed that the State of Arizona did not notify the LaGrands of their rights under the [Vienna Convention]. It is also undisputed that this claim was not raised in any state proceeding. The claim is thus procedurally defaulted.").

Convention could constitute cause for the failure to raise the claim in state court."[259] Courts find that [t]he legal basis for the Vienna Convention claim could ... have been discovered upon a reasonably diligent investigation by [the defendant's] attorney."[260]

234. By contrast, despite the fact that "the Vienna Convention has been in effect since 1969,"[261] federal courts also consider Vienna Convention claims to raise such new rules of criminal procedure so as to bar Vienna Convention claims pursuant to the non-retroactivity doctrine of *Teague v. Lane*.[262] Under *Teague*, the federal courts refuse to grant *habeas* relief based on a rule that "breaks new ground or imposes a new obligation on the States or the Federal Government."[263]

235. So, in short, U.S. courts consider a claim under Article 36 to be sufficiently new both to excuse an incompetent attorney and to trigger the non-retroactivity doctrine of *Teague* so as to bar relief for Mexican nationals whose rights *to be notified of the basis for such a claim* were violated, but not sufficiently novel to constitute justifiable cause for failing to timely raise them in trial proceedings.

236. *Second*, even where the Vienna Convention claims of Mexican nationals have not been defaulted, U.S. courts refuse to provide judicial remedies, because they have determined that the Vienna Convention does not create individual rights, or that it does not create fundamental due process rights on a par with constitutional rights (*e.g.*, the right to

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[259] *Breard v. Pruett*, 134 F.3d 615, 619-620 (4th Cir. 1998); *see also Murphy v. Netherland*, 116 F.3d 97, 100 (4th Cir. 1997) (same).

[260] *Id.* Ironically, while finding Vienna Convention claims insufficiently "novel" to excuse raising the claims below, courts refuse to grant *habeas* claims of ineffective assistance of counsel where inept trial counsel failed to raise such claims on the ground that Vienna Convention claims arose relatively recently and even competent counsel cannot be expected to have foreseen such a development in the law.

[261] *Breard v. Pruett*, 134 F.3d 615, 620 (4th Cir. 1998).

[262] *See supra* Chapter III.C.1.

[263] *Teague v. Lane*, 489 U.S. 288 (1989).

counsel), or that, in any event, Mexican nationals are not entitled to a remedy without meeting a high threshold of proof that they have been prejudiced by the United States's failure to abide by its obligations under Article 36.[264]

237. As a result of these various holdings declining to equate Article 36 rights with "fundamental rights," Mexican nationals generally cannot obtain any effective relief by asserting violations of the Vienna Convention.[265] For example, state courts have refused to extend to violations of Article 36 the constitutional rule of United States municipal law that excludes evidence obtained in violation of a defendant's rights under *Miranda v. Arizona*.

238. Just as the procedural default doctrine has "the effect of preventing 'full effect [from being] given to the purposes for which the rights accorded under [Article 36] are intended'" because it prevents foreign nationals from effectively challenging their convictions and sentences on the basis of Article 36 violations, so too the refusal to recognize Article 36 rights as fundamental to due process for a foreign national violates the mandate of Article 36(2) because it also prevents the courts "from attaching any legal significance" to the effect of such violations.[266]

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[264] *See supra* Chapter III.C.

[265] *See, e.g., State v. Chavez*, 19 P.2d 923, 925 (Or. 2001) (holding that the exclusionary rule does not apply to Vienna Convention violations); *Zavala v. State*, 739 N.E.2d 135, 138-43 (Ind. 2001) (same). Since *LaGrand*, federal courts addressing the issue have also continued to find that exclusion of evidence is entirely unavailable as a remedy for Article 36 violations. *See, e.g., United States v. Emuegbaum*, 268 F.3d 377, 390-91 (6th Cir. 2001), *cert. denied*, 122 S. Ct. 1450 (2002); *United States v. Felix-Felix*, 275 F.3d 627, 635 (7th Cir. 2001); *United States v. Carrillo*, 269 F.3d 761, 771 (7th Cir. 2001), *cert. denied*, 122 S.Ct. 1576 (2002); *United States v. Gamez*, 301 F.3d 1138, 1143-44 (9th Cir. 2002), *cert. denied* 2003 WL 21048997 (May 27, 2003); *United States v. Robinet*, No. 00-50495, 2001 WL 1631475, at *1 (9th Cir. 2001); *United States v. Contreras-Cortez*, No. 01-8030, 2002 WL 734772, at *2 (10th Cir. 2002); *United States v. Minjares Alvarez*, 264 F.3d 980 (10th Cir. 2001).

[266] *LaGrand*, para 91.

3. Clemency Review Does Not Give Full Effect To The Purpose Of Article 36 And Does Not Provide Uniform, Fair Or Meaningful "Review And Reconsideration."

239. At the hearing on provisional measures in this case, the United States for the first time explained to this Court its understanding of the obligation of "review and reconsideration." The United States argued that the Court's holding in *LaGrand* did not impose an obligation of result on the United States. Rather, "[t]he obligation imposed upon the United States under the Vienna Convention for a violation of the right of consular notification is an obligation of review and reconsideration, not an obligation of result."[267]

240. Moreover, the United States maintained that it alone had the choice of means in providing review and reconsideration. From this position the United States deduces that the Court "has already delineated what remedy is available under international law" and left it to the United States to implement the remedy.[268] It was thus "not appropriate for this Court" to review the means taken by the United States.[269]

241. The United States explained that, since it had the "choice of means," it had decided that "the clemency process" was "an appropriate means for ensuring review and reconsideration of convictions and sentences."[270] Counsel for the United States explained that:

> clemency has been one of the principal means by which the United States has sought to accomplish the review and reconsideration contemplated by this Court in *LaGrand*. It has elected to rely on the clemency process in the specific cases that have arisen since *LaGrand*. . . [The clemency process is] the

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[267] CR 2003/2 (Thessin), at 32, para. 3.46.

[268] *Id.*, at 33, para. 3.49.

[269] *Id.*

[270] CR 2003/2 (Brown), at 20, para. 3.10.

surest and most effective way to take account of the violation of the Vienna Convention rights.[271]

242. The United States openly admitted that it chose the remedy of clemency proceedings precisely because judicial proceedings may not always provide an adequate review and reconsideration of a conviction or sentence for a violation of the Vienna Convention. As the Agent for the United States put it plainly, "[a] court may determine . . . that domestic law principles still preclude an express judicial remedy for a failure of consular notification."[272] In short, the United States effectively conceded that its municipal laws do not presently permit "review and reconsideration" of convictions and death sentences by taking into account the violation of Article 36 rights of Mexican nationals. Hence, the United States maintains that "review and reconsideration through the clemency process occurs if it does not first occur in the judicial process."[273]

243. However, executive clemency does not fulfill the United States's obligation to give full effect to the purposes of Article 36, and the United States was and is not entitled to choose an ineffective remedy to satisfy its international legal obligations.

244. As an initial matter, the United States's reliance on clemency proceedings is wholly inconsistent with its obligation to provide a remedy, as that obligation was found by this Court in *LaGrand.*

245. *First,* it is clear that the Court's direction to the United States in *LaGrand* clearly contemplated that "review and reconsideration"

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[271] CR 2003/4 (Collins), at 16. *See also id.* at 25 (Taft) "We also have made a conscious choice to focus our efforts on clemency proceedings for providing the review and reconsideration this Court called for in *LaGrand* . . . clemency proceedings provide a more flexible process that is best suited for achieving, without procedural obstacles the review and reconsideration this Court called for".

[272] CR 2003/4 (Taft), at 25. And indeed this is an indisputable point. U.S. courts routinely and consistently refuse to provide judicial remedies for violations of Article 36. *See supra* Chapter III.C.

[273] CR 2003/2 (Brown), at 28, para. 3.34.

would be carried out by judicial procedures. The reference to "review and reconsideration" in the decision came in direct response to Germany's second submission: that the United States' application of the doctrine of procedural default barred Karl and Walter LaGrand from raising their Vienna Convention claims during appellate review. Procedural default is a purely judicial concept, with no bearing on clemency. The Court found that this denial of *judicial* review and reconsideration constituted a violation of the United States' obligation to give "full effect" to the rights enshrined under Article 36.[274]

246. *Second*, the Court was fully aware that the LaGrand brothers had received a clemency hearing, during which the Arizona Pardons Board took into account the violation of their consular rights.[275] Accordingly, the Court determined in *LaGrand* that clemency review alone did not constitute the required "review and reconsideration;" otherwise, the Court presumably would not have found that the United States violated its obligations to give "full effect" to the rights of the LaGrand brothers contained in Article 36.

247. *Finally,* the Court specified that 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."[276] As the United States is well aware, it is a basic matter of U.S. criminal procedural law that courts review convictions; clemency panels do not. With the rare exception of pardons based on actual innocence, the focus of capital clemency review is on the propriety of the sentence and not on the underlying conviction.[277]

248. Nevertheless, Mexico is compelled to address the United States' contentions that the clemency process is "an appropriate means" to review violations of Article 36.[278] As explained in detail below,

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[274] *See LaGrand, Judgment of 27 June 2001,* para. 128(4); paras. 90 and 91.

[275] *Id.*, paras. 27, 31.

[276] Id., para. 7 (emphasis added).

[277] *See Ohio Adult Parole Authority et al. v. Woodard*, 523 U.S. 284 (1998).

[278] CR 2003/02 (Brown), at 20, para. 3.10.

clemency review is standardless, secretive, and immune from judicial oversight.[279] Moreover, clemency procedures in most executing states within the United States are so grossly deficient that they could not possibly provide meaningful review or reliable reconsideration.[280]

249. Finally, the failure of state clemency authorities to pay heed to the interventions of the U.S. Department of State in cases of death-sentenced Mexican nationals refutes the contention that clemency review will provide meaningful consideration of the violations of rights conferred under Article 36.

a. The Nature of Clemency Review

250. By definition, clemency is an executive act of grace and not a matter of right.[281] The United States Supreme Court has repeatedly held that a prisoner has no constitutional entitlement to commutation of his sentence, and that clemency decisions are largely immune from judicial review.[282] "A petition for commutation, like an appeal for clemency, 'is simply a unilateral hope.'"[283]

> An examination of the function and significance of the discretionary clemency decision . . . readily shows it is far different from the first appeal of right. . . Clemency proceedings are not part of the trial – or even of the adjudicatory process. They do not determine the guilt or innocence of the defendant, and are not intended primarily to enhance the reliability of the trial process.[284]

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[279] *See generally* Declaration of Michael Radelet, Annex 1.

[280] *Id.*

[281] *Id.*

[282] *Id. See also Ohio Adult Parole Authority v. Woodard,* 523 U.S. 272 (1998); *Connecticut Bd. of Pardons v. Dumschat,* 452 U.S. 458, 464 (1981).

[283] *Ohio Adult Parole Authority et al. v. Woodard, supra,* at 280 (*citing Dumschat*, 452 U.S. at 465).

[284] *Id.* at 284.

251. As a Congressional subcommittee report concluded in 1993, "the prospect of clemency provides only the thinnest thread of hope and is certainly no guarantee against the execution of an innocent individual."[285]

252. It is widely recognized that clemency review in the United States is strongly influenced by political considerations, particularly in capital cases.[286] As one recent commentary states:

> Invariably, the clemency process involves an elected official and her or his appointees who regularly take into account the potential reaction of the news media, political allies and adversaries, special interest groups, as well as the implications for a future political career, whenever he or she makes a decision. The reality is perhaps best captured in the recent words of one governmental official: "if I told you that politics were irrelevant [to the clemency decision], that would be like the fish telling you the water doesn't matter."[287]

The risk that politics rather than the merits of the individual case will determine clemency outcomes is not limited to elected officials; appointed members of pardons boards are also implicated.[288]

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[285] Committee on the Judiciary, Subcommittee on Civil and Constitutional Rights, *Innocence and the Death Penalty: Assessing the Danger of Mistaken Executions*, page 18 (November 1994).

[286] *See, e.g.*, Declaration of Michael Radelet, Annex 1; J. Berry, *Governors Shy Away from Death Row Pardons*, Dallas Morning News, 15 August 1993, at 1J; C. Sullivan, Associated Press, BC Cycle, *Another Death Penalty Debate: Are Clemency Decisions Arbitrary?*, 27 June 1993; see also D. Kobil, *Chance and the Constitution in Capital Clemency Cases*, 28 Cap.U. L. Rev. 567, 567 (2000).

[287] B. Breslin & J.P Howley, *Defending the Politics of Clemency*, 81 Or. L. Rev. 231, 232 (2002).

[288] For example, H. Marsellus, former chairman of the Louisiana Board of Pardons and Paroles, has admitted that pressure from the Governor's office compelled him to vote against clemency in cases such as that of Timothy Baldwin, who Marsellus believed to be innocent. *See* H. Prejean, C.S.J., *Dead Man Walking*, (1993) pp. 169-74.

253. Due largely to the increased politicization of the death penalty itself, the use of clemency has declined precipitously in the last twenty-five years to the point where only a small fraction of those facing execution are now released from death row through executive action.[289] As the American Bar Association (ABA) has pointed out:

> In recent years, however, clemency has been granted in substantially fewer cases than it was prior to the U. S. Supreme Court's 1972 decision declaring the death penalty unconstitutional. . . In fact, the need for a meaningful clemency power is more important than ever.[290]

254. Each of the states in which Mexican nationals have been sentenced to death has instituted its own unique approach to executive clemency review.[291] In 14 states, the governor has sole authority for clemency review and decision-making. In 9 states, the governor may only commute a death sentence based on the favorable recommendation of a pardons board or other advisory body. In 9 other states, the governor makes a final decision after receiving a non-binding decision from an advisory body. In 3 states, the governor is a member of the clemency board, which makes a binding decision on a majority vote.

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[289] *See* M. A. G. Korengold et al., *And Justice For Few: The Collapse of the Capital Clemency System in the United States*, 20 Hamline L. Rev. 349 (1996).

[290] American Bar Association Section Of Individual Rights And Responsibilities, *Death without Justice: A Guide for Examining the Administration of the Death Penalty in the United States*, p. 23 (June, 2001). Available at <http://www.abanet.org/irr/pubs.html> (last visited 14 June 2003).

[291] Ariz. Const., Art. V, §5, Ariz. Rev. Stat. Ann. §§31-443, 31-445 (1996); Ark. Const., Art. VI, §18, Ark. Code Ann. §§5-4-607, 16-93-204 (1997, Supp. 1997); Cal. Const., Art. V, §8, Cal. Penal Code Ann. §§4800-4807 (West 1992); Fla. Const., Art. IV, §8, Fla. Stat. §940.01 (1997); Ill. Const., Art. V, §12, Ill. Comp. Stat., ch. 730, §5/3-3-13 (1997); Nev. Const., Art. V, §13, Nev. Rev. Stat. §213.100 (1995); Ohio Const., Art. III, §11, Ohio Rev. Code Ann. §§2967.01 to 2967.12 (1996); Okla. Const., Art. VI, §10, Okla. Stat., Tit. 21, §701.11a (Supp. 1998); Ore. Const., Art. V, §14, Ore. Rev. Stat. §§144.649 to 144.670 (2001); Tex. Const., Art. IV, §11, Tex. Crim. Proc. Code Ann., Art. 48.01 (Supp. 1997).

Finally, in 3 states, authority over clemency review and decisions rests solely with a pardons board which does not include the governor.[292]

255. Just as the mechanisms for executive clemency vary widely, so too do the actual procedures for reviewing petitions. Even states that rely on similar mechanisms have instituted widely differing review procedures. In some states, parole boards have the discretion to convene hearings on clemency petitions. Such clemency hearings are routinely held in Oklahoma and Arizona, whereas the Texas Board of Pardons and Paroles routinely fails to hold hearings and does not even meet as a body to discuss the petitions submitted to it.

256. In jurisdictions that rely entirely on clemency review by the state governor, such as California, no formal procedures exist for clemency hearings. As a consequence, governors must rely on their own private and subjective review of materials submitted by the prosecution and the defense, augmented by whatever interviews they may see fit to conduct. Identical claims for clemency may thus receive a full and open hearing in one jurisdiction and only cursory review when raised in an adjacent state.[293]

257. Governors and parole boards across the United States have virtually unfettered discretion to grant or deny commutation requests.[294] Although the general procedures for the consideration of clemency petitions are specified under state laws or regulations, few provisions exist to guide decision-makers on the criteria for exercising mercy. Clemency outcomes are thus entirely discretionary, subject only to the requirement in a handful of states that the executive authority must provide an explanation for its decision. The most common reasons for the 48 humanitarian commutations of death sentences between 1977 and 2002 were: doubt over the defendant's guilt (15 cases), disproportionate sentencing (10 cases), opposition to the death penalty in principle (9

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[292] Death Penalty Information Center, *Clemency*, available at <http://www.deathpenaltyinfo.org/Article.php?did=126&scid=13> (last visited 14 June 2003).

[293] *See* Declaration of Michael Radelet, Annex 1.

[294] *Id.*

cases) and mental incapacity (6 cases).[295] Due process concerns such as trial irregularities almost never result in humanitarian commutations; the assumption by many clemency authorities appears to be that such questions have already been addressed and disposed of by the appellate courts.[296]

258. The crisis in clemency review prompted the ABA to develop extensive criteria and recommendations to ensure the fairness of clemency proceedings nationwide.[297] To date, no state has adopted those recommendations.

259. Given the entirely discretionary nature of clemency review and the wide disparities in the procedures used, it is not surprising that the ratio of commutations to executions fluctuates wildly by jurisdiction. The following table displays the ratio between commutations of death sentences on humanitarian grounds and executions carried out, in each of the nine jurisdictions in which Mexican nationals are currently under sentence of death.

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[295] *See* M. L. Radelet & B. A. Zsembik; Executive Clemency in Post-Furman Capital Cases, 27 *University of Richmond Law Review* (1993), at p. 289 and the annual updates provided by the Death Penalty Information Center, Washington, D.C.

[296] For example, during his term as governor of Texas, George W. Bush reiterated that "the only two issues he considered appropriate for purposes of clemency were actual innocence and whether access to the courts had been provided." Amnesty International, Killing without Mercy: Clemency Procedures in Texas, p.8, AI Index: AMR/51/85/99. Available at <http://www.web.amnesty.org/library/index/ENGAMRS1085199?open&of=ENG-USA> (last visited 14 June 2003). *See generally* A.L. Williamson, *Clemency in Texas--A Question of Mercy?*, 6 Texas Wesleyan Law Review (1999), at p. 140.

[297] *Id.* at pp. 25-27.

Percentage ratio of commuted death sentences to executions, 1977-2003 (as of 26 February 2003)[298]

Jurisdiction	Executions	Humanitarian commutations	Percentage ratio
Texas	298	1	0.34%
Oklahoma	57	1	1.75%
Florida	55	6	10.91%[299]
Arkansas	24	1	4.17%
Arizona	22	0	0.00%
California	10	0	0.00%
Nevada	9	1	11.11%
Ohio	6	8	133.33%[300]
Oregon	2	0	0.00%
Average	54	2	3.70%

b. Clemency Proceedings Fail to Provide Necessary Procedural Safeguards.

260. As the U.N. Special Rapporteur on summary, arbitrary or extrajudicial executions has noted, "[p]ardon or commutation generally has limited fair procedure safeguards."[301] The United States has vigorously opposed the provision of federal funds to lawyers for death row inmates that would allow them to file clemency requests with state authorities.[302] As a result, indigent death row inmates in 12 states are no

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[298] *Death Penalty Information Center*, information available at: <http://www.deathpenaltyinfo.org/> (last visited 10 Jun 2003).

[299] No commutations have been granted in Florida since 1983.

[300] All 8 commutations were granted by an outgoing governor in 1991.

[301] UN Economic and Social Council, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, UN Doc. E/CN.4/1998/68/Add.3, para. 102, 22 January 1998.

[302] Brief for the United States as Amicus Curiae, *In re Gary A. Taylor*, No. 01-1605, November 2002.

longer entitled to receive federally funded legal representation to assist them in preparing clemency applications.[303] Consequently, many condemned prisoners will be executed without seeking clemency, simply because they cannot afford to retain a lawyer.[304]

261. The clemency process in Texas, where sixteen Mexican nationals are currently under sentence of death, has been harshly criticized for its lack of procedural fairness. In Texas, prisoners have no right to a hearing, no right to present witnesses, and no right to confront the witnesses against them. The UN Special Rapporteur "was appalled to find out that in Texas, the [pardons board] members never meet, do not discuss the cases brought to their attention together and provide their individual votes by phone."[305]

262. Indeed, the Texas Board of Pardons and Paroles has no substantive criteria to guide its members in deciding whether to spare an

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[303] *See Clark v. Johnson*, 278 F.3d 459, 462-63 (5th Cir.), *cert. denied (2002)*, 123 S.Ct. 687 (2002); *King v. Moore*, 312 F.3d 1365, 1368 (11th Cir.), *cert. denied*, 123 S.Ct. 662 (2002); *Hain v. Mullin*, 324 F. 3d 1146 (10th Cir. 2003). Collectively, these decisions are binding on 12 U.S. states which account for some 61% of all executions since 1977. The states (with numbers of executions as of April 3, 2003) are: Texas (301), Oklahoma (59) , Florida (54), Georgia (32), Louisiana (27), Alabama (26) Mississippi (6), Utah (6), Colorado (1), New Mexico(1), Wyoming (1), Kansas.

[304] For example, in the case of Emerson Rudd, the federal courts denied counsel's request for funding to present a clemency application on behalf of Mr. Rudd. The United States Supreme Court denied a stay of execution, and Mr. Rudd was executed without filing a clemency application. *Rudd v. Cockrell*, 122 S.Ct. 585 (2001). Of the twelve states cited above, only Florida provides by statute for state-funded representation of indigent prisoners in capital clemency proceedings. *See* Fla. Stat. Ann. §§ 27.702, 922.07, 925.035(4) (West 2001 & Supp. 2002).

[305] United Nations Economic and Social Council, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, supra*, para. 102, 22 January 1998. Not surprisingly, the board has never recommended pardon in a capital case.

inmate's life.[306] Board members are not required even to read clemency applications.[307] The Board has consistently refused to provide any notice of the factors it considers in weighing a prisoner's request for commutation of a death sentence.[308] Although the Board's regulations provide for clemency hearings, the Board has not convened a hearing for several years. At least 213 inmates have been executed without clemency hearings in the last eleven years.

263. After reviewing numerous Texas clemency petitions raising well-founded claims of actual innocence, mental retardation and other compelling issues, Amnesty International determined:

> Far from serving as the fail-safe mechanism envisaged by the US Supreme Court, the Texas Board Of Pardons And Paroles had become something akin to a hostile and secretive agency interested only in preserving the illusion of meaningful clemency review.[309]

264. The case of Canadian national Joseph Stanley Faulder illustrates the insurmountable obstacles facing foreign nationals seeking clemency review in Texas. Faulder's case involved an undisputed violation of Article 36, which prompted former Secretary of State Madeleine Albright to write a letter on his behalf to then-Governor George Bush and the Texas Board of Pardons and Paroles, suggesting that clemency might be an appropriate remedy for the treaty violation.[310]

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[306] *Faulder v. Texas Board of Pardons and Paroles, et. al.*, No. A-98-CA-801, at 111 (Testimony of Board Chairman Victor Rodriguez at Evidentiary Hearing on December 21-22, 1998), Annex 31.

[307] *Id.* at 66 (Testimony of Brett Hornsby, Supervis or of Texas Clemency Process for the Board of Pardons and Paroles) , Annex 31.

[308] *Id.* at 146-48 (Testimony of Victor Rodriguez) , Annex 31.

[309] Amnesty International, *Killing without Mercy: Clemency Procedures in Texas*, supra, page 5.

[310] *Id.*, at p. 5 (referring to Letter to Victor Rodriguez, Chairman, Texas Board of Pardons and Paroles, 27 November 1998). Excerpts of letter also available at <http://www.deathpenaltyinfo.org/Article.php?did =536&scid=45> (last visited 14 June 2003). Ms. Albright's letter, which contained eleven pages of

In her letter, she explained that Texas had violated Mr. Faulder's rights under the Vienna Convention on Consular Relations, described the impact of the violation on Mr. Faulder's trial, and offered to send State Department representatives to discuss the matter with the Board. By the time her letter reached the Board, however, all but four members of the Board had voted to deny Mr. Faulder's request for clemency.[311] The Board never responded to the Secretary's offer to meet with its members, nor did the Board poll its members who had already voted, to determine whether they wished to change their votes in light of the Secretary's observations.[312] The Board denied Faulder's request for commutation, and refused to grant him a hearing on his request.

265. Faulder sued, arguing that the Board's secretive clemency procedures had violated his right to due process. In December 1998, a federal district court in Austin, Texas convened a hearing in the case. Testimony elicited at the hearing established that none of the 17 board members had discussed Secretary Albright's letter. None of the several board members who testified could remember the contents of the letter, which they had received one month earlier. Board member Paul Prejean's testimony typifies the quality of the Board's review of the Article 36 violation:

> Q: . . . What did you think of Secretary of State Albright's letter?
>
> A: Well, the letter pretty much explained what the Geneva Convention was about and how the United States should live up to that agreement. I – I didn't have – you know, thought one way or another on it.

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observations on Faulder's case, pre-dated this Court's decision in *LaGrand*. Nevertheless, the letter presents a more convincing case for clemency than any of the United States' interventions post-*LaGrand*. Ms. Albright also offered to send Department officials to Texas to discuss the Vienna Convention with the Board, an offer that has not been repeated in any of the Department's letters to clemency authorities, post-*LaGrand*.

[311] *Faulder v. Texas Board of Pardons and Paroles, et. al.*, No. A-98-CA-801, *supra*, at p.7.

[312] *Id.*, at p.5.

> Q: What did you think about what her – you know, the eleven pages of observations about the Faulder case; what did you think about that?
>
> A: Well, my thought was – did she review the case? And I mean, how could she recommend things, that perhaps she hadn't read the case or –
>
> Q: Did you know whether she had read the case or reviewed the case?
>
> A: No. I'm assuming she didn't.[313]

266. Several Board members admitted that they did not read clemency petitions line for line.[314] After two days of testimony, the court observed:

> It is abundantly clear the Texas clemency procedure is extremely poor and certainly minimal. Legislatively, there is a dearth of meaningful procedure. Administratively, the goal is more to protect the secrecy and autonomy of the system rather than carrying out an efficient, legally sound system. . . . Giving reasons for its decisions and/or holding hearings to allow petitioners and other interested parties to present evidence would not threaten the employment of the Huntsville executioner.[315]

267. The court went on to note that a flip of the coin would provide a more merciful means of deciding clemency applications than the Board's unwavering denial of such requests.[316]

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[313] *Faulder v. Texas Board of Pardons and Paroles, et. al.*, No. A-98-CA-801, at 269-70 (Transcript of Evidentiary Hearing December 21-22, 1998) , Annex 31.

[314] *Faulder v. Texas Board of Pardons and Paroles, et al.*, No. A-98-CA-801, slip op. at 15 (W.D. Tx December 28, 1998).

[315] *Id.* at 16.

[316] *Ibid.*; *see also* Alan Berlow, *The Texas Clemency Memos*, The Atlantic (July/Aug. 2003) (observing that in the case of Mexican national Irineo Tristan

268. Finally, contrary to what the United States suggested in oral proceedings on Mexico's Request for Provisional Measures, clemency review is not exempt from procedural barriers that may prohibit consideration of an otherwise meritorious petition. On 10 March 2003 the Texas Board of Pardons and Paroles announced that it would not consider a request for clemency in the case of Delma Banks because the request was filed after a deadline requiring submission at least 21 days before execution dates. Lawyers missed the deadline by 7 days.[317]

269. Some states' procedures also limit the scope of the issues that may be considered in a clemency petition. In Utah, for example, judicial issues that have been or should have been raised through the courts must *not* be considered by the Board of Pardon and Parole.[318]

c. Violations of the Vienna Convention Are Given No Weight In Clemency Review.

270. Between 1988 and 2002, twenty confirmed foreign nationals were executed in the United States.[319] In that same time period, no executive commutations were granted to foreign nationals under sentence of death. Clemency applications citing consular rights violations were filed in more than half of the cases resulting in executions, to no avail.[320]

Montoya, the Governor's legal counsel did not even mention the Article 36 violation in his memorandum briefing the case for former Governor George Bush, even though the State Department had intervened in the case).

[317] W. Gardner Selby, *Ex-FBI boss helping inmate*, San Antonio Express-News, March 11, 2003, at 2B. Attorneys for Banks (including a former Director of the Federal Bureau of Investigations) had raised a number of compelling claims including actual innocence, the use by the prosecution of unreliable informants and the withholding of a crucial witness interview for 19 years.

[318] Utah Code Ann. § 77-27-5.5 (6) (1994).

[319] Death Penalty Information Center, *Foreign Nationals and the Death Penalty in the United States*, available at <http://www.deathpenaltyinfo.org/Article.php?scid=31&did=582#executed> (last visited 14 June 2003).

[320] *See, e.g.*, Declaration of Denise I. Young, paras. 7-10, Annex 5. Cases in which violations of Article 36 were cited in clemency applications include

271. Thai national Jaturun Siripongs was executed in California in 1998. Mr. Sirpongs was never informed of his consular rights, and his trial attorney had failed to conduct any investigation into his client's background and upbringing in Thailand. With the belated assistance of Thai authorities, fifty witnesses were located years after the trial who "would have provided compelling testimony about Siripongs' life and [good] character."[321] Both the Thai foreign ministry and Thailand's ambassador to the United States wrote to the Governor of California, seeking the commutation of the death sentence. Governor Wilson stated that "the plea from Thailand's ambassador was eloquent and dignified," but added, "[t]he fact that in this case a foreign national committed the crime should not make a difference under our system of law, which treats everyone as an individual."[322] During his two terms as governor, Wilson rejected all five requests he received for clemency in capital cases.[323]

272. In 1999, Nevada authorities rejected pleas by the Philippine government and executed Filipino national Alvaro Calambro, who had refused to file an appeal. Calambro's attorney noted that his client had an IQ of 71 and did not appear to understand the appellate process. Philippine officials argued that the execution would violate the Vienna Convention because they were not notified of Calambro's arrest in 1994, leaving him with inadequate legal representation. Attorney General Frankie Sue Del Papa responded that the U.S. Supreme Court had made clear that a foreign national imprisoned in the United States must raise alleged treaty violations in a timely manner, which Calambro had failed to do. Efforts by the Philippine government to persuade Governor

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Carlos Santana, Ramon Montoya, Irineo Tristan Montoya, Mario Murphy, Angel Breard, Jose Villafuerte, Jaturun Siripongs, Karl LaGrand, Walter LaGrand, Alvaro Calambro, Stanley Faulder, Miguel Flores, Javier Suárez Medina and Mir Aimal Kasi.

[321] Additional case information is available from Death Penalty Focus, at <http://www.deathpenalty.org/old_site/current/Siripongs/jsinfo.html> (last visited 14 June 2003).

[322] *Id.*, at 6B.

[323] Associated Press, *Wilson denies clemency to Siripongs*, November 14, 1998. <http://www.ccadp.org/siripongs.html> (last visited on 14 June 2003).

Kenny Guinn to commute the sentence were rejected. After meeting with diplomatic representatives, Guinn declared: "Since neither I nor the Pardons Board have seen any compelling evidence that would warrant a delay, I have no choice but to uphold the laws and constitution of the state of Nevada".[324]

273. Post-*LaGrand* cases have fared no better. In 2001, in the case of Mexican national Gerardo Valdez, the Oklahoma Pardon and Parole Board recommended commutation after reviewing extensive evidence gathered with the assistance of Mexico consular officers. Governor Keating subsequently refused to follow the Board's recommendation, even though it came as the result of the direct presentation of evidence at a full and open hearing.[325]

274. Similarly, in response to the imminent execution of Javier Suárez Medina, the State Department requested the Texas Board to give "specific consideration" to the admitted Article 36 violation in his case and to give written reasons for its decision.[326] The Board unanimously denied the request for a reprieve and for commutation on August 13, 2002, giving no specific reasons, written or otherwise, for its decision.[327]

d. Clemency Authorities Pay Little Or No Heed To The Department Of State.

275. The U.S. Department of State frequently responds to the imminent executions of foreign nationals deprived of their consular

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[324] S. Whaley, *Efforts to Postpone, Prevent Execution Fail*, Las Vegas Review-Journal, 3 April 1999.

[325] Amnesty International, *A Time for Action: Protecting the Consular Rights of Foreign Nationals Facing the Death Penalty*, page 9, AI Index: AMR 51/106/2001.

[326] Letter from William H. Taft IV to Mr. Gerald Garrett, 5 August 2002, Annex 25.

[327] According to Board Chairman Gerald Garrett, "We took into account all that was presented to us in support of the argument for commutation and voted to recommend against it." K. Murray, *Planned Texas Execution of Mexican Upsets Ties*, Reuters News Agency, 13 August 2002.

rights by calling on state authorities to investigate the Article 36 violation, or by requesting "serious consideration" of the treaty breach as grounds for clemency. Neither approach has influenced the outcome of even a single case and state authorities routinely brush aside these interventions.

276. As noted above, in November of 1998, then-Secretary of State Madeleine K. Albright wrote personally to the Chairman of the Texas Board of Pardons and Paroles, expressing deep concern over the Article 36 violation in the case of Canadian national Stanley Faulder.[328] Although Albright's letter and an accompanying 12-page memorandum on the effects of the violation on the quality of Faulder's trial defense were circulated to the Board members, the Board voted unanimously not to recommend clemency. Less than a month later, during a court hearing into the Texas clemency process, no member of the Board could recall any details of the Secretary of State's submissions.[329]

277. In response to State Department interventions in the case of Mexican national Mario Benjamin Murphy, the Governor of Virginia publicly "disputed whether it was Virginia's responsibility to notify Murphy, a foreigner on death row, of his Vienna Convention right".[330] Ignoring the fact that the courts had dismissed Murphy's appeal of the consular rights violation as procedurally defaulted, Governor Allen denied commutation on the grounds that "the issues raised on clemency ...were issues that were available to be considered in the courts and were so considered."[331]

278. In the case of Mexican national Irineo Tristan Montoya, the General Counsel to Texas Governor George W. Bush declined a State

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[328] Letter from the Hon. Madeleine K. Albright to Mr. Victor Rodriguez, November 27, 1998, Annex 29.

[329] Amnesty International, *Killing without Mercy: Clemency Procedures in Texas, supra*, p.7.

[330] F. Green, *Mission Chief Urges Allen to Commute Sentence*, Richmond Times-Dispatch, 17 September 1997, at A1.

[331] Commonwealth of Virginia Office of the Governor, *Statement of Governor George Allen Re: Mario Benjamin Murphy*, press release of 17 September 1997.

Department request to investigate and assess the Article 36 violation on the grounds that "the State of Texas is not a signatory to the Vienna Convention." [332] Montoya was executed two days later, after the Texas Board voted unanimously not to recommend clemency. Despite the lack of any meaningful judicial consideration of the treaty violation due to procedural default, Governor Bush refused to grant a reprieve, declaring that the courts "have had ample opportunity to address all of the issues involved."[333]

279. In any event, the Department of State has deliberately and publicly minimized its role in affording "review and reconsideration" through the clemency process. In response to media enquiries regarding the Suárez case, one spokesperson for the Department stated "We have taken no position, if that's clear enough, no position on this petition. That's a matter for the Texas authorities to do. We, though, play the role of passing along this type of message from the Government of Mexico."[334] Another spokesperson declared that the case "involves the State Department in some small regard."[335]

e. The Shortcomings of Clemency Review Preclude Meaningful Review and Reconsideration.

280. Any one of the points addressed above would be sufficient in itself to refute the notion that clemency review can provide meaningful "review and reconsideration." In short, clemency review is no surrogate for judicial procedures that guarantee due process, representation by

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[332] Al Kamen, *Virtually Blushing*, Washington Post, 23 June 1997, at A17.

[333] J. Pierpoint, *Court Rejects Mexican's Final Appeal*, Reuters News Agency, 18 June 1997.

[334] U.S. Department of State, *Daily Press Briefing*, Washington, DC, August 13, 2002, p.10, *available at*: <http://www.state.gov/r/pa/prs/ dpb/2002/12644.htm> (last visited 14 June 2003).

[335] U.S. Department of State, *National Security Council Briefing for Foreign Media*, Washington, DC, August 14, 2002, *available at*: <http://fpc.state.gov/12693.htm> (last visited 14 June 2003).

counsel, and decisions made in accordance with legal standards reviewed by higher courts.

281. The United States made clear at the provisional measures hearing that, in its view, it suffices that executive authorities of its constituent states have the authority — *not* the legal obligation — to review and reconsider a sentence and grant clemency based on a violation of the Convention.[336] Mexico disagrees.

282. Article 36(2) creates a *legal* obligation. It mandates a meaningful remedy under the municipal *laws* of each State party, not a theoretical political remedy that exists, if at all, as a matter of executive grace. The specific remedy need not be the same for each State — and given the diverse legal and political systems of States parties, almost certainly will not be the same. To construe "full effect" not to require some legal remedy, however, would be to eviscerate Article 36(2) altogether.

4. The United States Did Not Enjoy Unlimited Choice of Means But Was Obliged to Choose Means that Give "Full Effect" to the Purposes for Article 36.

283. The United States seriously misapplies the Court's holding in *LaGrand* when it insists that it enjoyed unlimited "choice of means." The means chosen must be designed to achieve the result, that is to provide an effective remedy that gives full effect to the obligations of the Vienna Convention. If the U.S. legal system does not provide the necessary means to afford an effective remedy, as the United States seems to have conceded, then the United States is under an obligation to amend its domestic laws. The provision of a wholly discretionary process that may or may not review or reconsider the violation of Article 36 and its effects is patently insufficient to satisfy the requirements of Article 36(2).

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[336] CR2003/02 (Brown), para.3.10.

a. The Means Chosen must be Designed to Achieve the Result and must Achieve an Effective Remedy.

284. The United States is incorrect to argue that there is no obligation of result. Under international law, the United States is required to take whatever action is necessary to give effect to its treaty obligations. Hence, the obligation of the result sought in this case is the fulfillment of the United States's treaty commitment in Article 36 of the Vienna Convention.

285. The precise manner by which the United States seeks to fulfill its obligations is a matter of domestic law. What domestic law mechanisms are utilized is not relevant, provided that those mechanisms uphold the international legal obligations of the United States. Under the well-established jurisprudence of this Court, the United States may not assert its domestic law as an excuse for evading any of the obligations incumbent on it under international law.[337] As provided in Article 31 of the ILC Articles on State Responsibility, a State responsible for an internationally wrongful act "may not rely on the provisions of its internal law as justification for failure to comply" with its obligations to make full reparation for the injury caused.[338] Hence, the United States

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[337] *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory, Advisory Opinion, 1932,* P.C.I.J., Series A/B, No. 44, p. 4; *Free Zones of Upper Savoy and the District of Gex, Free Zones of Upper Savoy and the District of Gex, Judgment, 1932,* P.C.I.J., Series A/B, No. 46, p. 167. *See also Greco-Bulgarian "Communities", Advisory Opinion, 1930,* P.C.I.J., Series B, No. 17, p.32; *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion,* I.C.J. Reports 1949, at p. 180; *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion of 29 April 1999, I.C.J. Reports 1999,* para. 62.

[338] *See also* Article 27 of the Vienna Convention on the Law of Treaties which provides that "a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." The principle has also been applied by numerous arbitral tribunals. *See, e.g.*, the "*Alabama*" case, in Moore, IV International Arbitrations 4144, 4156-57 (1872); *Norwegian Shipowners' Claims* (Norway/United States of America), 1 RIAA 309, 331 (1922); *Tinoco* case (United Kingdom/Costa Rica), 1 RIAA 371 (1923); *Shufeldt Claim,* 2 RIAA, 1081, 1098 (1930); *Wollemborg* case, 14 RIAA 283, 289 (1956).

cannot choose domestic means that do not allow it to comply fully with the international obligation.[339]

286. It does not matter whether the United States intended those means to provide effective review and reconsideration, if they in fact do not achieve that result. As the ILC remarked in its 1977 Report,

> where it is found that the situation created *in concreto* by the State, by taking one or other of the courses between which it had the initial choice, is incompatible with the result required by the obligation, the State will obviously not be able to claim that it has discharged its obligations through, for example, the adoption of measures by which it hoped to achieve the result required by the international obligation.[340]

287. Insisting on an effective remedy is an obvious recourse against the denial of rights, and in requiring that the United States provide an effective remedy, the Court is acting consistently with other international

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[339] Dionisio Anzilotti, former President of the Permanent Court of International Justice, stated:

> [L]a liberté que le droit international laisse à l'État dans le choix des moyens pour l'accomplissement des devoirs qui lui sont imposés ne doit pas rendre l'accomplissement même de ces devoirs moins sûr ou incertain....[I]l faut que l'accomplissement de ses obligations internationales soit en tout cas assuré; et lorsque cet accomplissement dépend, de quelque façon que ce soit, des lois ou de l'organisation intérieure de l'État, c'est à celui-ci de promulguer les règles et de se donner l'organisation nécessaires à assurer la conduite voulue par le droit international. Sans quoi, il n'y aurait plus aucune garantie de la réalisation du droit international, tout État pouvant toujours, en prenant prétexte ou moyen de son organisation et de ses lois, retarder ou rendre impossible l'exécution des devoirs qui lui sont imposés.

D. Anzilotti, *La responsabilité internationale des États à raison des dommages soufferts par des étrangers*, in Opere di Dionisio Anzilotti, 149, 177 (1956) (citations omitted).

[340] ILC Yearbook 1977, Vol.II, Part 2, comments to draft Article 21, at para. 26.

courts and tribunals.[341] Human rights courts, for example, require remedies that address the relevant violation and that provide appropriate relief to the victim of the violation.

288. In the *Las Palmeras* case, for instance, the Inter-American Court explained that "[i]t is the *jurisprudence constante* of this Court that it is not enough that such recourses exist formally; they must be effective."[342] The Court has also explained that, in order to be "effective," a remedy "must give results or responses to the violations of rights established in the Convention."[343] Remedies that "prove illusory

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[341] Article 2(3)(a) of the ICCPR, for example, requires States Parties "[t]o ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity." Article 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms provides that "[e]veryone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity." Article 25 of the American Convention on Human Rights also supports the availability of an effective remedy for the violation of its terms, as it provides: "Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violation his fundamental rights...".

[342] *See The Mayagna (Sumo) Awas Tingni Case*, Judgment of August 31, 2001, Series C, No. 79, paras 111-113; *Constitutional Court Case*, Judgment of January 31, 2001. Series C No. 71, para. 90; *Bámaca Velásquez Case*, Judgment of November 25, 2000, Series C No. 70, para. 191; *Cesti Hurtado Case*, Judgment of September 29, 1999. Series C No. 56, para. 125; *Paniagua Morales et al. Case, supra*, para. 164; *Suárez Rosero Case*, Judgment of November 12, 1997. Series C No. 35, para. 63; *Godínez Cruz Case*, Judgment of January 20, 1989, Series C No. 5, para. 66; *Velásquez Rodríguez Case*, Judgment of July 29, 1988, Series C No. 4, para. 63, and *Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 of the American Convention on Human Rights)*, Advisory Opinion OC-9/87 of October 6, 1987. Series A No. 9, para. 24.

343 *See, inter alia, Constitutional Court Case, supra,* para. 89, and *Bámaca Velásquez Case, supra*, para. 191.

due to the general situation of the country or even the particular circumstances of any given case, cannot be considered effective."[344]

289. Likewise, the European Court of Human Rights has held that a remedy is effective if the injured party is entitled to invoke it,[345] and the remedy entails an examination of the substance of the right violated by the State and grants appropriate relief.[346]

290. Hence, the means chosen by the United States can provide an effective remedy only if the accused has access to the remedy as a matter of law, and if that remedy provides a review and reconsideration of the conviction and sentence to address the "violation of the rights set forth in the Convention," and if it provides adequate relief.

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344 *See Bámaca Velásquez Case, supra*, para. 191; *Ivcher Bronstein Case,*, Judgment of 6 February 2001, Series C No. 74, para. 136; Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 of the American Convention on Human Rights, supra, at para. 24.

345 *See, e.g.*, A. Drzemczewski & C. Giakoumopoulos, Article 13, in: L.E. Pettiti, E. Décaux & P.H. Imbert, La Convention Européenne des Droits de l'Homme, Commentaire Article par Article,455, 467 ("En principe, le recours doit être accessible à l'intéressé lui-même, en ce sens que celui-ci doit avoir la qualité de partie devant l'instance nationale et surtout être à même d'intenter le recours et déclencher la procédure nationale"); *Plattform "Ärzte für das Leben" v. Austria, App. No. 10126/82, Eur. Comm'n H.R. (Series A, No.139),* 29-32, ¶¶ 107-111, 115, 119.

346 *See, e.g.*, A. Drzemczewski & C. Giakoumopoulos, *supra*, 467 ("Le recours doit être adéquate, à savoir, organisé de manière à permettre de dénoncer la violation alléguée de la Convention."); *see also The Soering*, Judgment of July 7, 1989, Eur. Ct. H.R. (Series A, No.161), para. 120; *Silver and Others,* Judgment of March 25, 1983, Eur. Ct. H.R., (Series A, No. 61), para. 113 (a) (victim "should have a remedy before a national authority in order both to have his claim decided and, if appropriate, to obtain redress").

b. If Necessary, The United States was Required to Change its Domestic Law to Conform Fully with its International Legal Obligations.

291. If the domestic laws of the United States make it impossible for officials of the United States to give "full effect" to the purposes of Article 36 as interpreted by this Court, the United States is under an obligation to modify those domestic laws.

292. It is well-established that a State that is party to a treaty must, if necessary, modify its domestic law in order to ensure proper compliance with the obligations it has assumed. As the Permanent Court held in its opinion concerning the *Exchange of Greek and Turkish Populations*, "a State which has contracted valid international obligations is bound to make in its legislation such modifications as may be necessary to ensure the fulfillment of the obligations undertaken."[347]

293. The Inter-American Court likewise observed that a State that has ratified a treaty "must introduce the necessary modifications to its domestic law to ensure the proper compliance with the obligations it has assumed."[348]

294. Notably, as the U.S. Secretary of State noted long-ago:

> Nor is a change of municipal law to meet the exigencies of international intercourse without precedent in the United States. In the case of McLeod, in 1842, when, in reply to the demand of the British Government for the release of the prisoner. . . . Congress amended the law regulating the issuance of writs of habeas corpus so as to facilitate the performance by the

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[347] *Exchange of Greek and Turkish Populations, 1925, P.C.I.J., Series B, No. 10*, p.20.

[348] "*The Last Temptation of Christ Case*" *(Olemdo Bustos et al.)*, Judgment of 5 February 2001, Inter-Am. Ct. H.R., Series C No. 73 (2001), paras. 85 and 87.

Government of the United States of its international obligations.[349]

295. Finally, the *travaux* of the Vienna Convention confirm that there can be no question that the State delegates who adopted the Convention were fully aware that Article 36(2), in particular, could require changes to a State's municipal laws or regulations in order for those laws and regulations to enable full effect to be given to Article 36.

296. State delegates dismissed the concern raised by Romania's delegate after the United Kingdom's amendment to replace the concept of "shall not nullify" with the language ultimately adopted, Article 36(2) would purport to "codify criminal law or criminal procedure."[350] The Romanian delegate continued that Article 36(2) "could not possibly attempt to modify the criminal laws and regulations or the criminal procedure of the receiving State."[351] The Soviet Union objected that as revised, Article 36(2) would "bring back an unsatisfactory situation from the past, when the consuls of colonial powers interfered with the internal affairs of States by hampering the administration of justice in regard to aliens."[352]

297. Addressing these objections that municipal law should prevail over international law, the United Kingdom's delegate simply responded: "that objection could not apply to the rights recognized in paragraph 1 of Article 36."[353]

298. The United States may therefore choose the means to implement its international obligations under the Vienna Convention but this choice still requires a result consisting of an effective remedy that

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[349] Correspondence with Mr. Connery, Chargé to Mexico, Nov. 1, 1887, *id.* at p. 239.

[350] *Official Records*, Vol. I, p. 38 (statement of Romania).

[351] *Id.*

[352] *Official Records*, Vol. I, p. 40 (statement of the Union of Soviet Socialist Republics).

[353] *Official Records*, Vol. I, p. 348 (statement of the United Kingdom).

produced adherence with international obligations. Moreover, the choice of means cannot be constrained by the United States' domestic law. If need be, that law must be changed in order to provide a remedy that gives full effect to the Vienna Convention.

V.

THE BREACHES OF ARTICLE 36 RESULTED IN FUNDAMENTALLY UNFAIR CRIMINAL PROCEEDINGS

299. By its terms, Article 36 of the Vienna Convention confers rights upon a sending State to provide consular assistance to detained nationals.[354] Equally by its terms, as this Court held in *LaGrand*, Article 36 confers rights upon foreign nationals of the sending state, who may seek the assistance of consular officers when detained.[355]

300. Here, Mexico suffered injury both directly and in the form of injury to its nationals. As to the direct injury, the past and continuing violations of Article 36 by the United States impair Mexico's rights under the Vienna Convention to the timely exercise of its consular functions with respect to its nationals.

301. Article 31(2) of the ILC Articles on State Responsibility broadly defines the injury for which a State may claim reparation as comprising "any damage, whether material or moral." It is well-settled that a State is injured when an internationally wrongful act deprives the State of the opportunity to exercise its rights.[356] As the International Law Commission has observed:

> [w]here two States have agreed to engage in particular conduct, the failure by one State to perform the obligation necessarily

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[354] Vienna Convention, art. 36(1).

[355] *LaGrand*, para. 77.

[356] *See* R. Ago, Second Report on State Responsibility, ILC Yearbook 1970, vol.II, 195, doc. A/CN.4/233, para. 54 ("every breach of an engagement *vis-à-vis* another State and every imp airment of a subjective right of that State in itself constitutes a damage, material or moral, to that State").

> concerns the other. A promise has been broken and the right of the other State to performance correspondingly infringed.[357]

302. It is equally well-established that an injury suffered by nationals of a particular State is also an injury to the State of their nationality.[358] Hence, Mexico has been injured not only because the breaches have prevented it from providing consular assistance to Mexican nationals in capital proceedings, but because those nationals have been prevented from receiving that assistance.

303. When a receiving State's breach prevents a detained national from seeking, and a sending State from providing the consular assistance contemplated by Article 36, the ultimate injury takes the form of an unfair criminal proceeding. The consular notification and assistance provisions of Article 36 do not guarantee mere courtesies or conveniences; they have as their object to guarantee to a sending State the opportunity to ensure fair proceedings for its nationals subject to trial before the criminal authorities of a foreign State.

304. At bottom, therefore, the rights protected by Article 36 are in the nature of due process rights: that body of rights whose objective is to guarantee procedural fairness when a governmental authority charges an individual with a crime and seeks to impose criminal penalties. This case perfectly illustrates that point in the most compelling possible context: that of criminal proceedings in which the receiving State seeks the death penalty.

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[357] Draft Articles on responsibility of States for internationally wrongful acts, *Report of the International Law Commission on the work of its Fifty-third session*, Official Records of the General Assembly, 56th session, Supplement No. 10, U.N. Doc. A/56/10 (2001).

[358] *Mavrommatis Palestine Concessions, Jurisdiction, Judgment, 1924, P.C.I.J., Series A, No. 2,* at 12; s*ee also Panevezys-Saldutiskis Railway, Judgment, 1939, P.C.I.J., Series A/B, No. 76*, at 16; *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949*, at 185.

A. THE DEPRIVATION OF CONSULAR NOTIFICATION AND ASSISTANCE RENDERS CRIMINAL PROCEEDINGS FUNDAMENTALLY UNFAIR

305. The right to a fair and just criminal process is a fundamental principle in international law and implicit in the concept of ordered liberty.[359] Procedures necessary to maintaining the fair and just character of a criminal proceeding constitute the due process of the law to which every person is entitled. The International Covenant on Civil and Political Rights ("ICCPR"), binding both on Mexico and the United States, recognizes due process of the law as a right derived directly from "the inherent dignity of the human person."[360]

306. The basic components of due process are widely recognized. Article 14 of the ICCPR defines the minimum standards of due process in a criminal proceeding to include, among other things, the right to "a fair and public hearing;" the right to "full equality;" the right "to be informed promptly and in detail and in a language which [the defendant] understands of the nature and cause of the charge against him;" the right to have adequate time and facilities to prepare a defense and to communicate with counsel of his own choosing; the right to have the free assistance of an interpreter in court, if necessary; and the right "not to be compelled to testify against himself or to confess guilt."[361]

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[359] *See e.g.*, C. Safferling, *Towards an International Criminal Procedure* (2001) pp. 20-21 ("[F]or the criminal trial[,] [f]airness is absolutely essential in order to arrive at a just verdict. ...This discourse is not limited to the determination of the facts and the assurance of proof but is concerned also with the personality of the perpetrator, how far he can be held responsible, and how much punishment should be imposed. Procedural fairness is crucial for the realization of justice in a democratic society").

[360] *International Covenant on Civil and Political Rights*, Dec. 19, 1966, *Preamble*, para. 3. 9.9.9. U.N.T.S. 171 (*entered into force* Mar. 23, 1976) [hereinafter ICCPR]. *Cf.* Universal Declaration, art. 10; *Prosecutor v. Delalic et al.*, , Decision on the Admissibility of Handwriting Evidence, 19 January 1998, ICTY, Case No. IT-96-21, at para.59 (affirming that "[i]t is the sacred and solemn duty of every judicial institution to respect and give benevolent construction to the provisions guaranteeing [fair trial] rights").

[361] *ICCPR*, art. 14.

307. A departure from the requirements of procedural fairness renders illegitimate any conviction or sentence resulting from the flawed proceedings. As the Inter-American Court has stated, "[t]he legitimacy of [a] judgment rests upon the legitimacy of the process."[362] This principle applies with special force in death penalty cases, where the "penalty is irreversible" and "the strictest and most rigorous enforcement of judicial guarantees is required of the State so that those guarantees are not violated and a human life not arbitrarily taken as a result."[363]

308. Consular notification constitutes a basic component of due process by ensuring both the procedural equality of a foreign national in the criminal process and the enforcement of the other fundamental due process guarantees to which that national is entitled. It is therefore an essential requirement for fair criminal proceedings against foreign nationals.

1. Consular Notification Is Necessary to Ensure the Procedural Equality of Foreign Nationals in the Criminal Process.

309. Due process guarantees recognize – and attempt to redress – the disparity of power between a prosecuting governmental authority and a criminal defendant. They provide the procedural equality essential to enable the defendant to defend his interests effectively.[364] As the Inter-American Court has stated:

> To accomplish its objectives, the judicial process must correct any real disadvantages that those brought before the bar might have, thus observing the principle of equality before the law and the courts and the corollary

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[362] *Castillo Petruzzi et al.* Case, Judgment of May 30, 1999, ¶ 219, Inter-Am. Ct. H.R. (Ser. C) No. 52 (1999).

[363] *Adv. Opinion OC-16*, para. 136.

[364] *Adv. Opinion OC-16*, para. 117 ("For 'the due process of law' a defendant must be able to exercise his rights and defend his interests effectively and in full procedural equality with other defendants"); *see also Delcourt v. Belgium, Judgment (Merits) of 17 January 1970,* Eur. Ct. H.R. 2689/65/A-11, at para. 28.

> principle prohibiting discrimination. The presence of real disadvantages necessitates countervailing measures that help to reduce or eliminate the obstacles and deficiencies that impair or diminish an effective defense of one's interests. Absent those countervailing measures, . . . one could hardly say that those who have the disadvantages enjoy a true opportunity for justice and the benefit of the due process of law equal to those who do not have those disadvantages.[365]

310. Christoph Safferling makes the same point when he writes that

> it is of utmost importance that a 'fair trial' guarantees the respect for the dignity of the suspect in a situation where he is jeopardized most. Criminal proceedings must never treat the defendant like an object. The subjectivity of the person must be guaranteed, that means he must be put into a situation where he can effectively participate in the proceedings.[366]

311. The consular notification and assistance guarantees of Article 36, in turn, reflect a recognition that a foreign national facing criminal charges in a receiving State stands on a fundamentally different footing than does a national of that State.

312. Detained foreign nationals face obstacles of language and culture, unfamiliarity with the legal system, fears of deportation, and isolation from family, friends, and their community. Consular officers are uniquely well-positioned to educate their nationals concerning their legal rights and to dispel the national's culturally-rooted misconceptions of the criminal justice system.[367] In addition to acting as a "cultural bridge," consular officers provide a physical link to the information and

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[365] *Adv. Opinion OC-16*, para. 119.

[366] Safferling, *supra*, at p. 29. *See* Nihal Jayawickrama, The Judicial Application of Human Rights Law: National Regional and International Jurisprudence, at 505 (referring to the equality of arms as the principle of procedural equality of the parties at trial).

[367] *See supra* Section III.A.

individuals from the sending State that are necessary for the defense of the foreign national.[368]

313. Further, foreign nationals – and Mexican nationals in particular – are frequently subject to discriminatory treatment as a consequence of their race and immigrant status. Whether subtle or overt, shouted or murmured, bias often infects the treatment given to foreign nationals in the courtrooms, jails, and lawyers' offices of receiving states. Consular officers can detect the presence of unfair bias and raise such concerns with the appropriate authorities and, if need be, with the court itself.[369]

314. It is for these reasons that the drafters of Article 36 of the Vienna Convention recognized the right to consular notification and assistance as a basic human right. Mr. Douglas Edmonds, the United States member of the International Law Commission, for instance, urged that "[t]he protection of human rights by consuls in respect of their nationals should be the primary consideration for the Commission."[370] At the Vienna Conference, various delegates characterized the receiving States' obligation under Article 36 as "extremely important because it relates to one of the fundamental and indispensable rights of the individual."[371]

315. It is the fact that the United States has likewise recognized "consular protection as an inherent right of every citizen."[372] As the Department of State advised the United States Congress:

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[368] *See supra* Chapter III.A. (explaining the activities of consular officers in obtaining evidence and facilitating the transport of witnesses).

[369] *See supra* Section III.A. (discussing the role of consular officers in ensuring the fairness of proceedings involving foreign nationals).

[370] *Yearbook of the International Law Commission 1960 vol. I*, p. 47 (para. 41); *see also* comment by Milan Bartos, *id.*, p. 46 (para. 28).

[371] *See* Official Records, Vienna Convention on Consular Relations, U.N. Doc. No. A/Conf.25/16. *See also infra* Chapter V,B,2.

[372] *Statement of Hon. Leonard F. Walentynowicz, Administrator, Bureau of Security and Consular Affairs, Department of State*, U.S. Citizens Imprisoned in Mexico: Hearings before the Subcommittee on International Political and

> That right is not affected by evidence or findings of guilt. Nor has it anything to do with the nature of the alleged crime, be it murder, narcotics smuggling, or a minor traffic violation. Providing consular protection to American citizens arrested, detained, or imprisoned abroad is a basic historic responsibility of this Department and its consular officers.[373]

316. In that, detained foreign nationals suffer from discrete and particular vulnerabilities that Article 36 guarantees seek to redress. Those guarantees address the detainee in his capacity as foreign national, not simply as criminal defendant. For that reason, other due process guarantees, such as a right to counsel, cannot substitute for Article 36 rights.[374]

2. Consular Notification Ensures the Enforcement of Other Essential Due Process Guarantees.

317. In a very real sense, the right to be informed of potential consular assistance is the essential first step for detained foreign nationals to the exercise or waiver of their right against self-incrimination, to the effective assistance of counsel, and to the opportunity to prepare a defense. When the mandates of Article 36(1) are violated, the due process rights of detained foreign nationals are necessarily undermined and the procedural protections that characterize a fair and just criminal proceeding lose their meaning.[375]

Military Affairs of the House Committee on International Relations, 94th Cong., 1st Sess. Part I, at 16 (1975).

[373] *Id.*

[374] As the Court held in *LaGrand*, the fact that "United States courts could and did examine the professional competence of counsel assigned" did not eliminate a "violation of the rights set forth in Article 36, paragraph 1" that prevents a sending state "in a timely fashion, from retaining private counsel for them and otherwise assisting in their defence as provided for by the Convention." *See LaGrand*, para. 91.

[375] M. Kadish, Article 36 of the Vienna Convention on Consular Relations: A Search for the Right to Consul, 18 *Michigan Journal International Law* (1997) at p. 609 (The deprivation of the nationals' rights under Article 36 of the Vienna

a. Right To Be Protected Against Self-Incrimination

318. Of all of the due process rights set forth in Article 14 of the ICCPR, none is more important in protecting against the danger of wrongful convictions than the right not to be compelled to confess guilt. As the United States Supreme Court has observed,

> all the careful safeguards erected around the giving of testimony, whether by an accused or any other witness, would become empty formalities in a procedure where the most compelling possible evidence of guilt, a confession, would have already been obtained at the unsupervised pleasure of the police.[376]

319. It is during interrogation that the singular vulnerability of foreign nationals, stemming from their disadvantages of language and unfamiliarity with the receiving state's legal system, is most apparent and easily abused.

320. While the United States provides certain procedural protections for detainees, they are often inadequate to apprise foreign nationals of their rights. Foreign nationals are isolated, confused, and frightened and are more inclined to waive legal rights without understanding their import.[377] The rapid recital of the *Miranda* rights prior to interrogation

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Convention "raises a presump tion of prejudice"). As such, consular notification is similar to other rights, such as the right to counsel, that, when violated, cause the criminal process to lose its character as a meaningful, adversarial confrontation. In the United States, when a defendant has actually or constructively received no assistance of counsel, "the adversary process [is] itself presumptively unreliable." *United States v. Cronic*, 466 U.S. 648, 659 (1984).

[376] *Miranda,* 384 U.S. at 466 (citing *Mapp v. Ohio*, 367 U.S. 643, 685 (1961) (Harlan, J., dissenting)).

[377] For instance, the approximately thirty-eight Mexican nationals in the Application gave statements to United States law enforcement officers prior to being notified of their consular rights. In many cases, the statements were used as the principal – if not the only – evidence of the defendant's guilt. *See* Declaration of Roberto Rodríguez, Exhibit A (detailed case summaries), Annex 7. As one commentator has noted, a suspect's statements to the police can

may pass unnoticed by a foreign national for whom English is not his primary language.[378] Detained Mexican nationals, as result of the differences between the United States and Mexican criminal justice systems, are particularly apt to misunderstand the significance of early questioning. The consequence of these disadvantages is that foreign nationals may falsely confess to crimes they did not commit.[379]

321. The presence of consular officials throughout interrogation provides an essential safeguard against such abuses, and undoubtedly "enhances the integrity of the fact-finding processes in court."[380] Thus, the foreign national's right to seek the guidance of consular officers is essential to an intelligent, voluntary, and informed decision whether to exercise his right to remain silent in the face of interrogation.

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fatally undermine his credibility before the jury, even when they are, on their face, non-incriminating. N. Jayawickrama, *The Judicial Application of Human Rights Law: National Regional and International Jurisprudence* (2002) at p. 576.

[378] *See* Declaration of Roseann Dueñas Gonzalez, Annex 4; *supra* Chapter III.A. When Mexican national Virgilio Maldonado was arrested, for example, he spoke only Spanish, had less than a first grade education, and was mentally retarded. Although the police informed him of his *Miranda* rights, including his right to have an attorney present while he was interrogated, the interrogating officers spent only *39 seconds* reading those rights to Mr. Maldonado, and did not in any way attempt to explain them. He subsequently confessed in response to interrogation. At trial, prosecutors relied heavily on his confession to obtain a conviction, since there was virtually no other evidence tying him to the crime. Mr. Maldonado's case, listed #32 in Mexico's Application, is fully described in Declaration of Roberto Rodríguez, Exhibit A, para. 220-228, Annex 7.

[379] *See* Declaration of Roseann Dueñas Gonzalez, para. 36 (describing the case of Mexican national Omar Aguirre) , Annex 4. Researchers have documented several cases in which innocent defendants falsely confessed to murders they did not commit, and were then sentenced to death on the basis of that confession. *See, e.g.,* Center on Wrongful Convictions, *Causes and Remedies: False Confessions* (February 2002)(available at http://www.law.northwestern.edu/depts/clinic/wrongful/documents/FalseConfRpt1.htm) (last visited 17 June 2003).

[380] *See supra* Center on Wrongful Convictions.

b. Effective Assistance of Counsel

322. Just as the right to be protected against self-incrimination is essential to prevent coerced or false confessions, the right to counsel is fundamental to ensuring equality of arms between the government and an individual accused of a crime.[381] While all criminal defendants have the right to effective legal representation,[382] no one requires the assistance of competent counsel more than a defendant facing the death penalty.[383]

323. The right to consular notification and access is necessary to ensure the effective assistance of counsel. The Vienna Convention expressly states that "[c]onsular functions consist in: ... representing or arranging appropriate representation for nationals of the sending State before the tribunals and other authorities of the receiving State."[384]

324. Indeed, the importance of consular assistance in securing counsel was recognized by Robert J. McCloskey, the then Assistant Secretary of State for Congressional Relations:

> [E]arly notification of arrest . . . will . . . . further enable us to make available to [the detained American citizen]

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[381] The right of the accused to be assisted by legal counsel is set forth in virtually every international instrument dealing with the rights of accused persons. *See, e.g.*, ICCPR, Art. 14(3)(d); European Convention on Human Rights and Fundamental Freedoms, 4 Nov. 1950, 213 U.N.T.S. 221, *entered into force* 3 Sept. 1953, Art. 6(3)(c); American Convention on Human Rights, 22 Nov. 1969, 1144 U.N.T.S. 123, *entered into force* 18 July 1978, Art. 8(2)(d) and 8(2)(e).

[382] *See supra* Chapter III.A.

[383] *See supra* Chapter III.A. (discussing the procedures in a capital proceedings). The Court has already observed in *LaGrand* that violations of Article 36 in cases involving severe penalties or prolonged incarceration merit special consideration. *See LaGrand*, paras. 63, 123. Nowhere is this more appropriate than in a case in which a national's very life is at stake.

[384] Vienna Convention, art. 5(i).

information regarding the judicial system and the obtaining of responsible legal counsel.[385]

325. Like the United States, Mexico, when notified of a detained national, attempts to secure and assist legal counsel for that national. In particular, Mexican consular officers receive special training so that they may effectively monitor and support defense counsel in capital proceedings.[386] Should counsel fail in his duty to provide competent representation, consular officers do not hesitate to intervene.[387] Through these efforts, consular officers have enhanced the quality of legal representation for their nationals in innumerable cases.

c. The Rights To Present a Defense and To Collect and Present Evidence.

326. Article 14(3)(e) of the ICCPR guarantees the right of the accused to "have adequate time and facilities for the preparation of his defence" and to "obtain the attendance of witnesses on his behalf under the same conditions as witnesses against him."[388]

327. Foreign nationals facing the death penalty suffer the twin disadvantages of indigence and geographic separation from their home countries.[389] Together, these disabilities make it nearly impossible for

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[385] *Letter from Hon. Robert J. McCloskey, supra,* at 37.

[386] *See supra* Chapter III.A. Declaration of Roberto Rodríguez Hernández at para. 7.

[387] *See, e.g.,* Declaration of Michael Iaria, para. 5, Annex 6.

[388] These rights are reiterated in the European Convention, Articles 6(3)(b) and 6(3)(d); the American Convention, Articles 8(2)(c) and 8(2)(f); and the African Charter on Human and People's Rights, 27 June 1981, OAU, document CAB/LEG/67/3/Rev.5; 21 I.L.M. 58, *entered into force* 21 Oct. 1986, Article 7(1)(c).

[389] Even if a foreign national has lived in the United States for years, crucial mitigation is invariably located in his home country. A thorough mitigation investigation is multi-generational, and "encompasses all the forces which molded the client's life, both nature and nurture, the confluence and convergence of genetic predispositions and environmental influences... Investigation of the

foreign nationals to marshal the evidence critical to their defense, both at the guilt and penalty phases of a capital proceeding.

328. There is an enormous disparity in the resources available to the governmental entity that prosecutes crimes and the foreign national, who is isolated from family and friends and without the means of gathering evidence to present a defense. Many states, including the United States, simply do not provide the financial resources necessary to undertake an investigation in a foreign country, or for the bilingual experts essential in the defense of a criminal case.[390]

329. The collection of mitigating and other relevant evidence from the sending State is a fundamental consular activity. When a sending State's nationals are tried and sentenced in a foreign country, consular officers are often the singular conduit for the receipt and transmission of information from the sending State. Vital information about a defendant's education, mental capacity, health or social situation may only be accessible through state agencies. Consulates may organize psychological and neuropsychological testing, if necessary. Consular officers are also uniquely well-situated to locate, transport, and arrange visas for otherwise unavailable witnesses so that they may testify on the national's behalf.[391]

330. When deprived of the right to seek consular assistance, a detained foreign national, particularly in a capital murder proceeding, stands in deadly peril. Given his undeniable vulnerability, the inherent disparity in resources between the receiving state and the individual defendant, and the indispensable role of consular officers in ensuring the fundamental fairness of the proceedings, his right to seek consular

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client's childhood includes the climate of caregiving in the home, the quality of relationships, hygiene, nutrition, education, exposure to toxins (in the air, in the dwelling, in utero, etc.)..." R. Stetler Mitigation Evidence in Death Penalty Cases, *The Champion* (January/February 1999) available at <http://www.criminaljustice.org > (last visited 2 May 2003).

[390] *See supra* Chapter III.A.

[391] *See supra* Chapter III.A.

assistance can only be characterized as a basic component of due process.

B. CONSULAR NOTIFICATION HAS BEEN WIDELY RECOGNIZED AS A FUNDAMENTAL DUE PROCESS RIGHT AND, INDEED, A HUMAN RIGHT

1. Consular Notification Has Been Internationally Recognized as an Essential Element of Due Process

331. "Due process is not a static concept, it undergoes evolutionary change to take into account accepted current notions of fairness."[392] Developments in international law confirm the status of consular notification as "among the minimum guarantees essential to providing foreign nationals the opportunity to adequately prepare their defense and receive a fair trial."[393] The fundamental due process character of the right to consular access, and indeed its character as a human right, has been recognized by the Inter-American Court of Human Rights, treaty-law, State practice, and academic literature.

332. *First*, the Inter-American Court of Human Rights, in its recent Advisory Opinion on the *Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*[394]

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[392] *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382, 1388 (10th Cir. 1981) (considering international law principles for notions of fairness in affirming writ of habeas corpus for excludable Cuban refugee who was being detained in federal prison); *see also* V. Uribe, Consuls as Work: Universal Instruments of Human Rights and Consular Protection in the Context of Criminal Justice, 19 *Houston Journal International Law* (1997) at p. 390 (noting the evolution of the concept of due process in American jurisprudence, citing the Restatement (Third) of the Foreign Relations Law of the United States § 711, cmt. a (1986)). Notions of due process have evolved considerably in the United States, for example, since the inception of the Vienna Consular Convention. *See e.g.*, *Washington v. Texas*, 388 U.S. 14 (1967) (ensuring the right to compulsory process for the purpose of obtaining favorable witnesses); *Miranda v. Arizona*, 384 U.S. 436 (1966) (excluding confessions without informing the defendant of his right to an attorney).

[393] *Advisory Opinion OC-16*, at para. 122.

[394] *See supra* Chapter III.D.3 (discussing the opinion more fully).

unequivocally held that the right to prompt consular access under Article 36 (1) "must be recognized and counted among the minimum guarantees essential to providing foreign nationals the opportunity to adequately prepare their defense and receive a fair trial."[395] The Court unanimously resolved:

> That the individual's right to information established in Article 36(1)(b) of the Vienna Convention on Consular Relations allows the right to the due process of law recognized in Article 14 of the International Covenant on Civil and Political Rights to have practical effects in concrete cases; Article 14 establishes minimum guarantees that can be amplified in the light of other international instruments such as the Vienna Convention on Consular Relations, which expand the scope of the protection afforded to the accused.[396]

333. *Second*, a number of international instruments on the individual rights of foreigners expressly include the right provided for by Article 36 of the Vienna Convention and confirm that the right to consular notification under Article 36 (1) is an essential element of due process. The 1984 United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, is an example in point. It provides in Article 6.3 that

> [a]ny person in custody pursuant to paragraph 1 of this Article shall be assisted in communicating immediately with the nearest

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[395] *Adv. Opinion OC-16*, para. 122.

[396] *Id.* para. 141.6. *See also id.* para. 23 for the position taken by the Inter-American Commission in its written submissions in the OC-16 proceedings, stating that "the very objective of the notification provision of Article 36 . . . is to ensure that alien detainees—who may not enjoy 'equality of arms' with the detaining authority—benefit from consultation with their consul. That consultation, and notification thereof, provide a means to ensure that the conditions are met which will protect the right of the alien detainee to a trial conducted with due guarantees. The notification provision of Article 36 thus plays a role in, and is integrally linked to ensuring due process.... The failure of a party to the Vienna Convention to carry out its treaty based commitment may, in either case, implicate the due process guarantees of the inter-American human rights system."

appropriate representative of the State of which he is a national, or, if he is a stateless person, with the representative of the State where he usually resides.[397]

334. Another example can be found in the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, adopted by the United Nations General Assembly in December 1990. It provides in Article 16.7 that:

> [w]hen a migrant worker or a member of his or her family is arrested or committed to prison or custody pending trial or is detained in any other manner:
>
> (a) The consular or diplomatic authorities of his or her State of origin or of a State representing the interests of that State shall, if he or she so requests, be informed without delay of his or her arrest or detention and of the reasons therefore;
>
> (b) The person concerned shall have the right to communicate with the said authorities. Any communication by the person concerned to the said authorities shall be

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[397] Likewise, most of the international conventions dealing with terrorism contain a provision reflecting the obligations under Article 36(2) of the Vienna Convention. Some contain practically identical language. *See, e.g.*, 1999 OAU Convention on the Prevention and Combatting of Terrorism, art. 7(3); the 1999 International Convention for the Suppression of the Financing of Terrorism, art. 9(3); the 1997 International Convention for the Suppression of Terrorist Bombings, art. 7(3); the 1994 Convention on the Safety of United Nations and Associated Personnel, adopted on 9 December 1994, art. 17(2) (entitling any alleged offender to communicate without delay to the nearest appropriate representative of the State or States of which such person is a national); the 1979 International Convention against the taking of hostages, art. 6(3); the 1973 Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents, art. 6(2); the 1971 Convention for the suppression of unlawful acts against the safety of civil aviation, art. 6(3); the 1963 Convention on offences and certain other acts committed on board aircraft, art. 13(2). The draft International Convention for the suppression of acts of nuclear terrorism, art 10(3); and the draft Comprehensive Convention on International Terrorism, art. 10(3), currently under consideration of the UN General Assembly, contain similar provisions.

forwarded without delay, and he or she shall also have the right to receive communications sent by the said authorities without delay;

(c) The person concerned shall be informed without delay of this right and of rights deriving from relevant treaties, if any, applicable between the States concerned, to correspond and to meet with representatives of the said authorities and to make arrangements with them for his or her legal representation.[398]

335. The right to immediate consular access has further been embodied in a number of UN resolutions providing for basic human and due process rights.[399] For instance, the United Nations Declaration on the human rights of individuals who are not nationals of the country in

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[398] Article 16.5 of Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, provides that "each State Party shall comply with its obligations under the Vienna Convention on Consular Relations, where applicable, including that informing the person concerned without delay about the provisions concerning notification to and communication with consular officers." G.A. res. 55/25. 55 U.N. GAOR Supp. (No. 49) at 65, U.N. Doc. A/45/49 (Vol. I) (2001), Article 16.5.

[399] In addition, as this Court had previously noted, General Assembly resolutions, though not legally binding *stricto sensu*, may have normative value to the extent that they reflect the existence of a rule of law or the emergence of an *opinio juris*. *Legality of the Threat of the Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports, 1996,* para. 70. Although it would only be natural for international tribunals to confirm the existence of a rule of law, as Jorge Castañeda writes: "il n'existe aucune raison essentielle qui interdise à d'autres organes internationaux, largement représentatifs, d'exprimer valablement, au nom de la communauté internationale, ce qui, dans l'opinion de celle-ci, *est* le droit international a ùn moment donné." *See* J. Castañeda, *Recueil des cours*, (Collected Courses of the Hague Academy of International Law), 1970 I, Vol. 129, p.315 (les resolutions "ne créent pas le droit, mais elles peuvent prouver, avec autorité, son existence"); M. Pinto, *De la protection diplomatique a la protection des droits de l'homme*, Revue Générale de Droit International Public, 2002-3, p.545 ("Cet ensemble de règles de *soft law* prévoient l'assistance consulaire parmi les garanties judiciaires applicables a des étrangers.").

which they live, adopted by United Nations General Assembly on 13 December 1985, provides that:

> [a]ny alien shall be free at any time to communicate with the consulate or diplomatic mission of the State of which he or she is a national or, in their absence, with the consulate or diplomatic mission of any other State entrusted with the protection of the interests of the State of which he or she is a national in the State where he or she resides.[400]

336. *Third*, a large number of States have repeatedly affirmed the fundamental due process character of the right to consular notification and access. In the proceedings before the Inter-American Court regarding the Advisory Opinion No.16 (OC-16), for instance, seven States supported the argument that the right to consular access under Article 36(2) of the Vienna Convention constituted an important due process right.[401] Following the issuance of Advisory Opinion OC-16, eighteen States, the European Union on behalf of its fifteen member

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[400] U.N. General Assembly Resolution 40/144 of 13 December 1985, adopted without a vote. The drafting history of the declaration shows that various Governments referred to the close relationship between Art. 10 of the Declaration and Art. 36 of the Vienna Convention on Consular Relations (see U.N. Doc. E/CN.4/1354 p. 19). *See also* U.N. General Assembly Resolution A/RES/43/173 of December 9, 1988 ("Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment"), pr. 16(2); G.A. Res. 45/113 U.N. GAOR, 45th Sess., Supp. No. 49, U.N. Doc. A/RES/45/113 (1990) ("Rules for the Protection of Juveniles Deprived of their Liberty"), Rule I.56; and resolution of 23 April 2003 of the UN Commission on Human Rights regarding Migrant Rights, U.N. Document E/CN.4/2003/46, para 7.

[401] *Adv. Opinion OC-16*, para. 26. Those States were Mexico, Costa Rica, El Salvador, Guatemala, Honduras, Paraguay and the Dominican Republic. The argument was further supported by non-governmental organizations, academics, and individuals appearing before the Court. *See* Briefs of *Comisión Mexicana de Defensa y Promoción de los Derechos Humanos*, Human Rights Watch / Americas and Center for Justice and International Law; Death Penalty Focus of California; International Human Rights Law Institute of Depaul University College of Law and McArthur Justice Center; Minnesota Advocates for Human Rights and Sandra Babcock; Bonnie Lee Goldstein and William H. Wright Jr.; and Adele Shank and John Quigley, all of them appearing as *amici curiae* before the Inter-American Court of Human Rights, OC-16/99.

States, and the European Commission expressed their support of the Inter-American Court's conclusion that the right to consular access under Article 36(2) constitutes a fundamental due process right when they appeared as *amici curiae* in at least five death penalty cases[402] involving foreign nationals in the United States. In addition, nineteen states sent official communications to Governors and Boards of Pardons and Paroles in support of clemency petitions in death penalty cases involving foreign nationals.[403] The increasing support of OC-16 by foreign governments in death penalty cases involving foreign nationals strongly suggests the existence of an emerging consensus in the practice of nations.

337. *Finally*, leading scholars have likewise advocated the due process character of the right to consular access contained in Article 36(2). For Martin Mennecke, for example,

> it appears evident that a foreign national facing criminal proceedings abroad has due process related interests to consult with his consulate [and that] [t]his functional link entwining the consular communication set forth under Article 36 with due

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[402] In five cases, demarches were filed: Miguel Angel Flores; Gregory Madej; Gerardo Valdez-Maltos; Arboleda A. Ortiz, Plutarco Tello and Germán Sinisterra; and Javier Suarez-Medina. Furthermore, two judges of the Supreme Court of Illinois wrote dissenting opinions when the writ of *certiorari* requested by Mr. Gregory Madej was denied. *Illinois v. Gregory Madej*, 193 Ill. 2d 395 (Ill. 2000). Judge McMorrow observed that the Inter-American Court's holdings on OC-16 "mirror[ed] this court's own recognition that death penalty cases require a high standard of procedural accuracy." *Id.* (quotation and citation omitted). Justice Heiple observed that the consular notification requirement "is meant to ensure that foreign nationals imprisoned abroad have adequate legal representation and that they should be tried in accordance with principles of justice generally recognized in the international community." *Id.*

[403] Those States are Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Iceland, Mexico, Panama, Paraguay, Poland, Switzerland, Uruguay, and Venezuela.

process guarantees of international human rights law is even more obvious in cases involving the death penalty.[404]

338. Similarly, Eric Robert has affirmed that

> L'existence et l'application effective des droits de protection consulaire constituent pourtant un élément important des droits de la personne à l'heure ou les individus se déplacent de plus en plus souvent à l'étranger pour différentes raisons ... le but de l'Article 36 est de permettre le procès équitable des étrangers, et que les droits reconnus par cet Article, comme le reconnaissait le juriste Yasseen, sont étroitement lies aux droits de l'homme, en l'occurrence, le droit a la défense.[405]

2. Consular Notification Under Article 36 is an Essential Due Process Right and, Hence, a Human Right.

339. Because of its fundamental due process character, the right to consular notification and access without delay was already recognized by many States as a human right as early as the negotiating process of the Vienna Convention on Consular Relations. Members of the United Nations International Law Commission, and States participating in the Diplomatic Conference that adopted the Vienna Convention on Consular Relations, identified the human rights nature of consular notification and access.

340. Mr. Milan Bartos, a member of the ILC, observed during the deliberations that then Article 30 A "was intended to safeguard human rights ...."[406] He further noted that:

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[404] M. Mennecke, Towards the Humanization of the Vienna Convention of Consular Rights-The LaGrand Case Before the International Court of Justice, *German Yearbook of International Law*, Vol.44, 2001, p.453.

[405] E. Robert, *La protection consulaire des nationaux en péril? Les ordonnances en indication de mesures conservatoires rendues par la Cour internationale de justice dans les affaires* Breard (Paraguay c. Etats-Unis) *et* LaGrand (Allemagne c. Etats-Unis), Révue Belge de Droit International, 1998/2, Vol.XXXI, p.444 and p.447.

[406] Yearbook of the International Law Commission 1960 vol. I, p. 46 (para. 28).

> [a] code such as the Commission was preparing was an integrated whole and in its definition of the consular functions the human rights of a foreigner could not be ignored, for it was precisely one of the consul's functions to protect those rights of his nationals.[407]

341. During the 13th session of the International Law Commission in 1961, Mr. Edmonds, the U.S. member of the ILC, again called the right of a foreigner to communicate with the consulate of his or her home state "a very fundamental human right."[408]

342. Similarly, at the Diplomatic Conference that adopted the Vienna Convention on Consular Relations, the Korean Representative referred to "[t]he receiving State's obligation under paragraph (1)(b) [a]s extremely important because it relates to one of the fundamental and indispensable rights of the individual."[409] The Greek Representative noted that codification of the international law and customs on consular relations was consistent with the "present-day trend of promoting and protecting human rights, for which future generations would be grateful."[410] Finally, in the same context, the Spanish Delegate stated that: "the right of the nationals of a sending State to communicate with and have access to the consulate and consular officers of their own country... is one of the most sacred rights of foreign residents in a country."[411]

343. The *travaux préparatoires* confirm that States participating at the Diplomatic Conference that adopted the Vienna Convention were clear on the nature of the rights embodied in Article 36. The fact that the Vienna Convention is not in itself a human rights instrument is not

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[407] *Id.*, p. 50 (para. 23).

[408] Yearbook of the International Law Commission 1961, vol. I, p. 33 (para. 16).

[409] *See* Official Records, Vienna Convention on Consular Relations, U.N. Doc. No. A/Conf.25/16.

[410] *Id.*

[411] *Id.*

relevant and does not prevent that instrument from recognizing human rights.[412]

344. As previously shown, without the benefits flowing from the due process rights embodied in Article 36 of the Vienna Convention, the fifty-four Mexican nationals were subject to inherently flawed and unfair proceedings. The injury caused both to Mexico and to the fifty-four Mexican nationals admits of no doubt. As conclusively stated by the Inter-American Court of Human Rights, in criminal proceedings in which foreign nationals'

> most precious juridical rights, perhaps even their lives, hang in the balance [...] it is obvious that notification of one's right to contact the consular agent of one's country will considerably enhance one's chances of defending oneself and the proceedings conducted in the respective cases, including the police investigations, are more likely to be carried out in accord with the law and with respect for the dignity of the human person.[413]

345. Despite the international recognition of consular notification as an element of fundamental due process and a human right, the rights of Mexican nationals have been regularly violated – and continue to be violated – by the authorities of the United States. Stripped of this right, these foreign nationals have been subjected to criminal proceedings

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[412] Article 5.2 of the International Covenant on Civil and Political Rights recognizes that not all civil and political rights are spelled out in its provisions. Other scholars have affirmed that "individual rights need not necessarily derive from classical human rights treaties." *See* C. Tams, Consular Assistance and Rights and Remedies:Comments on the ICJ's Judgement in the LaGrand Case, 13 *European Journal of International Law* (2002) at p. 1257. Monica Feria Tinta, has also acknowledged that, "The relevance of human rights norms is evident today in areas as varied as immunities or the law of the sea." *See* M. Tinta, Due Process and the Right to Life in the Context of the Vienna Convention on Consular Relations: Arguing the LaGrand Case, 12 *European Journal of International Law* (2001) at p.10. This trend has been characterized by Judge Antonio Cançado Trindade as the *humanization* of international law. *See Advisory Opinion OC-16*, concurring opinion, para 35.

[413] *Advisory Opinion OC-16*, para. 121.

without the fairness and dignity to which each person is entitled.[414] Consequently, the integrity of these proceedings has been hopelessly undermined, their outcomes rendered irrevocably unjust.

[414] *Id.*

VI.

MEXICO IS ENTITLED TO FULL REPARATIONS FOR THE UNITED STATES'S VIOLATIONS OF THE VIENNA CONVENTION

346. In *LaGrand*, this Court had the opportunity to provide a definitive interpretation of the rights of the sending State and its nationals and the corresponding obligations of the receiving State under Article 36 of the Vienna Convention.

347. The Court, however, did not have the same opportunity with respect to remedies, for the simple reason that the German nationals who were the subject of that case had been executed at the time the Court rendered its judgment. For that reason, Germany did not seek the primary international law remedy of *resitutio in integrum*.[415]

348. In this case, by contrast, the Mexican nationals who prompted Mexico's filing, though under sentence of death in various constituent jurisdictions of the United States, remain alive. This case, therefore, will require the Court to consider, in a fundamentally different posture than *LaGrand*, the remedies to which Mexico is entitled. Specifically, this case will give the Court the opportunity to elaborate on its rulings in *LaGrand* by bringing fully to bear its authority to issue authoritative declarations of legal right, to order *restitutio in integrum*, and to direct

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[415] Even in that posture, however, the Court granted Germany substantial relief, *first*, in declaring that, in failing to notify Karl and Walter LaGrand without delay of their consular notification rights, the United States had breached its obligations under Article 36(1) of the Convention; *Second*, in declaring that, by failing to permit review and reconsideration of the LaGrands' convictions and sentences that took account of the Article 36(1) violations, the United States had breached its obligation under Article 36(2) to give full effect to the purposes of Article 36; And *finally*, by holding, in response to Germany's request for assurances of non-repetition, that should any German national be sentenced to a severe penalty in a proceeding that violated Article 36, the United States would have the obligation to permit review and reconsideration that took account of that violation. *LaGrand*, paras. 128(3), (4), (7).

that illegal conduct cease and that guarantees of non-repetition of the illegal conduct be provided.

349. But just as the Vienna Convention violations in this case are clear, so, too, are the remedies that flow from those violations.[416] Under general international law, Mexico is entitled to reparations from the United States for its violations of Article 36 of the Vienna Convention. The Vienna Convention itself need not provide for any specific form of remedy, because Mexico's remedial rights ensue from secondary rules of State Responsibility. As the United States explained in *United States Diplomatic and Consular Staff in Tehran*:

> It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation, therefore, is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the Convention itself.[417]

350. Mexico seeks full reparations under general international law for the U.S. violations of Articles 36(1) and (2) of the Vienna Convention. The "essential principle" is that "reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had

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[416] "Where jurisdiction exists over a dispute on a particular matter, no separate basis for jurisdiction is required by the Court to consider the remedies a party has requested for a breach of the obligation." *LaGrand (Germany v. United States of America), Judgment of 27 June 2001, I.C.J. Reports 2001*, para. 48. *See also Factory at Chorzów, P.C.I.J., Series A, No. 9*, 22. The Court has jurisdiction under the Optional Protocol to decide the dispute relating to the interpretation and application of the Vienna Convention. *See infra* Chapter II. Hence, it also has jurisdiction to order the remedies that Mexico seeks.

[417] Memorial of the United States, *United States Diplomatic and Consular Staff in Tehran, I.C.J. Pleadings 1980*, p. 188, quoting *Factory at Chorzów, Jurisdiction, Judgment No. 8, 1927, P.C.I.J. Series A, No. 9; see also Factory at Chorzów, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17*, p.29; *Affaires des biens britanniques au Maroc espagnol (Sp.-Gr. Brit.), 1 May 1925*, 2 R.I.A.A. 615, 641.

not been committed."[418] Article 34 of the Articles on State Responsibility provides for reparation in "the form of restitution, compensation and satisfaction, either singly or in combination."[419]

351. In this proceeding, Mexico seeks only that relief that is essential to ensure that its nationals receive fair process in criminal proceedings in which their life is at stake. Mexico does not seek monetary compensation or any other form of remedy to redress any moral, psychological, and physical injuries suffered by its nationals by virtue of the denial of Article 36 rights in their capital criminal proceedings. Nor does Mexico seek a blanket pardon or any other form of relief that would prevent the United States from retrying the nationals in proceedings that conform with the requirements of Article 36.

352. To ensure that its nationals receive fair process in criminal proceedings in which their lives are at stake, Mexico seeks three forms of relief.

353. *First*, Mexico seeks declarations that the United States has violated its international legal obligations to Mexico, in its own right and in the exercise of its right of consular protection of its nationals.

354. *Second*, because declarations standing alone would not remedy the injury sustained by Mexico and its nationals,[420] Mexico seeks *restitutio in integrum*. In the circumstances here, *restitutio in integrum* requires that this Court order the United States to take all steps necessary to ensure that (1) the convictions and sentences of the fifty-four Mexican

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[418] *Factory at Chorzów, Merits, 1928, P.C.I.J., Ser. A, No. 17, p. 47.*

[419] As the ILC has observed, "[w]iping out all the consequences of the wrongful act may . . . require some or all forms of reparation to be provided, depending on the type and extent of the injury that has been caused." ILC Articles on State Responsibility, Commentary to Art. 34, para. 2.

[420] *See, e.g.*, D. Shelton, *Remedies in International Human Rights Law* (1999) p. 128 ("[d]eclaratory judgments may be useful where the act or omission imputed to the state is unlawful but where there is no material or objective injury suffered or it is not possible to prove the injury. In general, however, a declaration of wrongdoing is rarely sufficient to remedy the harm done to an individual, national or alien.").

nationals subject to this proceeding are vacated; (2) all evidence obtained in violation of Article 36 is excluded from any future criminal proceeding against those nationals; and (3) no municipal law bar is applied to prevent any of the Mexican nationals subject to this proceeding from obtaining relief from the Vienna Convention violations.[421] Such an order is necessary to restore the situation that existed prior to the commission of the internationally wrongful acts.

355. *Finally*, Mexico requests an order of cessation and guarantees of non-repetition in order to terminate the United States' ongoing violations of article 36 of the Vienna Convention and to prevent comparable violations in the future.

A. MEXICO IS ENTITLED TO A DECLARATION.

356. Mexico seeks declarations in its own right, as well as in the right of its nationals, as part of the reparations owed by United States for its unlawful conduct. The purpose of a declaratory judgment is to "ensure recognition of a situation at law, once and for all and with binding force as between the Parties, so that the legal position thus established cannot again be called in question in so far as the legal effects ensuing therefrom are concerned."[422] The declarations requested by Mexico, which are set forth in Mexico's Submissions below, are designed to state clearly and precisely the international legal obligations of the United States under the Vienna Convention, as well as the consequences that arise from those obligations. These declarations are an essential complement to the other remedies sought.

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[421] By "municipal law bars," Mexico is referring to the federal and state procedural default rules, the retroactivity doctrine from *Teague v. Lane*, and the lack of remedies at law. *See supra* Chapter III, Section C.1.

[422] Interpretation of Judgments, *Nos. 7 and 8 (Factory at Chorzów), P.C.I.J., Series A, No. 13*, p. 20.

B. MEXICO IS ENTITLED TO *RESTITUTIO IN INTEGRUM*.

1. *Restitutio in Integrum* Requires Re-establishment of the *Status Quo Ante*.

357. It is well-established that the primary form of reparation available to a State injured by an internationally wrongful act is *restitutio in integrum*.[423] Article 35 of the ILC Articles on State Responsibility provides that

> a State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed.

The ILC deliberately adopted a definition of *restitutio in integrum* that required the responsible State to "re-establish[] the *status quo ante*, *i.e.* the situation that existed prior to the occurrence of the wrongful act."[424] This definition is consistent with the holdings of this Court and other international courts.

358. In the case concerning the *Free Zones of Upper Savoy and the District of Gex*, the Permanent Court required that France "withdraw its customs line in accordance with the provisions of the said treaties and instruments; and that this regime must continue in force so long as it has not been modified by agreement between the Parties."[425] In his Preliminary Report to the International Law Commission, Professor

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[423] Commentary to Art. 35 of the Articles on State Responsibility, para 1.

[424] *Id.* at para. 2. The importance of returning to the situation pre-existing the commission of the internationally wrongful act has been recognized by other distinguished international jurists. *See, e.g.*, P. Guggenheim, 2 Traité de Droit International Public (1954), 68-69 ("Un des premiers principes appliqués est celui de la restitutio in integrum, de la remise en état."); Restatement (Third) of the Foreign Relations Law of the United States § 901, cmt. d (1987) ("Ordinarily, emphasis is on forms of redress that will undo the effect of the violation, such as restoration of the status quo ante, restitution, or specific performance of an undertaking.")

[425] *Free Zones of Upper Savoy and the District of Gex, PCIJ, Series A/B, No. 46, Judgment of 7 June 1932*, p. 96, at p. 172.

Arangio-Ruiz observed that, "[a]lthough the Court did not expressly qualify its decision as purporting a French obligation of *restitutio*, the withdrawal envisaged obviously implies, in addition to the cessation of a situation not in conformity with international law, that re-establishment of the *status quo ante* which is at least the main portion of the essential content of *restitutio*."[426]

359. The Central American Court also endorsed this view in holding that restitution required re-establishing the situation that existed prior to the conclusion of the Bryan-Chamorro Treaty. El Salvador complained that a concession for a naval base in the Gulf of Fonseca granted by Nicaragua in the Treaty violated El Salvador's rights of co-ownership. The Central American Court ordered the re-establishment of the *status quo ante* by imposing a duty on Nicaragua "to re-establish and maintain the legal status that existed prior to the Bryan-Chamorro Treaty between the litigant republics."[427]

360. The Inter-American Court for Human Rights, too, has invariably defined *restitutio in integrum* as "re-establishing the previous situation"[428] and as "restoring, insofar as possible, the situation as it was before the violations were committed."[429]

361. The ILC expressly rejected an alternative definition of *restitutio in integrum* that would have required the responsible State to establish the situation that *would have* existed had the wrongful act not occurred. As the ILC explained, that broader definition confuses the

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[426] *Preliminary Report on State Responsibility by Mr. Gaetano Arangio-Ruiz, Special Rapporteur*, UN Doc. A/CN.4/416 and Add.1 in ILC Yearbook, 1988, Vol. II, Part One, p. 26, para. 76.

[427] *Bryan-Chamorro Treaty Case (Nicaragua v. El Salvador)*, 11 Am J. Int'l L. 674 (1917) at 696.

[428] *See, e.g., Ivcher Bronstein Case, Judgment of 6 February 2001, Inter-Am. Ct. H.R. (Ser.C) No. 74 (2001)*, para. 178; *Constitutional Court Case (Aguirre Roca, Rey Terry and Revoredo Marsano vs. Peru), Judgment of January 31, 2001, Inter-Am. Ct. H.R. (Ser.C) No. 71 (2001)*, para. 119.

[429] *Ivcher Bronstein Case, Interpretation of the Judgment on the Merits of 4 September 2001, Inter-Am. Ct. H.R. (Ser.C) No. 84*, para. 21.

general concept of reparation with the specific remedy of restitution.[430] Whereas "reparation must, so far as possible, wipe out all the consequences of the illegal act and re-establish the situation that would, in all probability, have existed if that act had not been committed,"[431] *restitutio in integrum* is only one of various remedies of reparation that may be utilized to achieve that result.

362. In addition, the ILC recognized that the obligation to re-establish the *status quo ante* – as opposed to an obligation to establish the situation that would have existed if the act had not occurred – has "the advantage of focusing on the assessment of a factual situation and of not requiring a hypothetical inquiry into what the situation would have been if the wrongful act had not been committed."[432]

363. The United States is therefore obliged to take the necessary action to restore the *status quo ante* in respect of Mexico's nationals detained, tried, convicted and sentenced in violation of their internationally recognized rights.

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[430] Articles on State Responsibility, Commentary to Art. 35, para. 2 ("latter definition absorbs into the concept of restitution other elements of full reparation and tends to conflate restitution as a form of reparation and the underlying obligation of reparation itself").

[431] *Factory at Chórzow, Merits, 1928, P.C.I.J., Series A, No. 17*, p.47.

[432] Articles on State Responsibility, Commentary to Art. 35, para. 2. Indeed, the United States argued in *LaGrand* that the determination whether timely notification would have prevented the deaths of the LaGrand brothers "rest[s] on speculation" and is based on "suppositions." *LaGrand*, para. 72. Earlier, it had argued that it "would be unworkable for a court to attempt to determine reliably what a consular officer would have done and whether it would have made a difference. . . . Surely, governments did not intend that such questions become a matter of inquiry in the courts." *Vienna Convention on Consular Relations (Paraguay v. United States of America), CR 1998/7 (Brown)*, para. 2.18. *See also* Brief to the Supreme Court in *Breard v. Greene*, 1997 U.S. Briefs 1390, Annex 34, at 23 (argument of the U.S. Solicitor General before the Supreme Court) ("there is no workable way to determine whether consular notification would have made a difference at a defendant's trial, given the inviolability of consular archives and the privileges and immunities of consular officers").

2. To Re-Establish the *Status Quo Ante*, the United States Must Ensure the *Vacatur* of the Convictions and Sentences, Ensure the Exclusion of Evidence Illegally Obtained, and Prevent the Application of Municipal Law Bars.

a. Mexico Is Entitled To *Vacatur* of the Convictions and Sentences of Its Nationals.

364. To restore the *status quo ante*, the convictions and sentences of the fifty-four Mexican nationals subject to this proceeding must be vacated. Here, the injury consists of a criminal proceeding (1) in which fundamental due process protections in the form of guarantees of consular notification and assistance were denied, and (2) which resulted in a criminal conviction and death sentence. In these circumstances, restoration of the *status quo ante* requires relieving the person subjected to the unfair proceeding of the legal effects of the tainted conviction and sentence.[433] Only by vacating the convictions and sentences rendered illegitimate by virtue of the denial of fundamental procedural rights may the responsible State make it possible for the sending State and its national to exercise their rights in a new proceeding in which those rights are respected.[434]

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[433] The removal of the effects of the illegal act in the restoration of the *status quo ante* is inherent in returning to the situation that existed prior to the unlawful act. *See* O. Schachter, International Law in Theory and Practice, 178 *Hague Rec.* (V, 1982) p. 190 ("When a State is internationally responsible for a wrongful act, it is under an obligation to discontinue the act *and to prevent the continuing of the effects of the act.* It is also normally under a duty to restore the situation as it existed before the breach. This may require it to carry out actions which it failed to do in accordance with its international obligation.") (emphasis added).

[434] *Constitutional Court Case, Judgment of January 31, 2001, Inter-Am. Ct. H.R. (Ser.C) No. 71 (2001),* paras. 119-120 (finding that the due process violation required *restitutio in integrum* so that "the victims are ensured the enjoyment of their violated rights and freedoms.").

365. It is well-established that the restoration of the *status quo ante* may consist of the *vacatur* of a judicial decision.[435] In its Commentary to the Articles on State Responsibility, the ILC observed that *restitutio in integrum* may take the form of "the reversal of some judicial act" such as "the rescinding or reconsideration of an administrative or judicial measure unlawfully adopted in respect of the person or property of a foreigner."[436]

366. Restitution, therefore, requires annulment of the judgment of a national tribunal when that judgment results from proceedings conducted in violation of international law.[437] For example, in the *Martini* case,[438]

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[435] *See* Preliminary Report on State Responsibility by Mr. Gaetano Arangio-Ruiz, Special Rapporteur, UN Doc. A/CN.4/416 and Add.1 in ILC Yearbook, 1988, Vol. II, Part One, at para. 73, *citing* K. Nagy, The problem of reparation in international law, in Questions of International Law: Hungarian Perspectives, (H. Bokor-Szego, ed., vol. 3, p. 173, at 177-78) (maintaining that *restitutio in integrum* may mean "annulment of certain decisions, e.g. laws, the omission of which cannot be compensated by payment of money"); J. Personnaz, La reparation du prejudice en droit international public 77 (1939) (stating that juridical *restitutio* may "lead to the revocation, annulment or amendment of the act" and may imply "the annulment or amendment of the judgment"); Guiliano, Diritto internazionale 594 (2nd ed, 1983) (including in his description of *restitutio in integrum*, "[t]he repeal of a law enacted in violation of a rule of international law ... [and] the rescinding of an administrative or judicial measure unlawfully adopted in respect of the person or property of a foreigner..."). *See also Restatement of the Law (Third), The Foreign Relations Law of the United States* (1987), § 901, cmt. c (1987) ("The obligation of a state to terminate a violation of international law may include discontinuance, revocation, or cancellation of the act (whether legislative, administrative or judicial) that caused the violation").

[436] ILC, Report on the work of its fifty-third session (2001), Draft Articles on the Responsibility of States for Internationally Wrongful Acts, Commentary to Art. 35, para. 5.

[437] L. Reitzer, La Réparation comme Conséquence de l'Acte Illicite en Droit International 173 (1938) ("Restitution may consist in the annulment of the judgment of a national tribunal delivered in contradiction of international law."). *See also* P. Daillier, A. Pellet: Nguyen Quoc Dinh, Droit International Public, 5e ed. (1994), 768, ¶ 506 ("Si l'acte illicite est un acte juridique, la remise des choses en l'état consiste dans son annulation, indépendamment de sa nature, même s'il s'agit d'une décision de justice.").

the Italian-Venezuelan Commission examined the judicial proceedings before Venezuelan courts against the Martini company and annulled certain payment obligations imposed by the Venezuelan court, where the proceedings constituted "a patent injustice" and were thus in violation of international law. The tribunal held:

> En prononçant leur annulation, le Tribunal Arbitral souligne qu'un acte illicite a été commis et applique le principe que les conséquences de l'acte illicite doivent être effacées.[439]

367. For another example, in the case concerning *Appeal from a Judgment of the Hungaro/Czechoslovak Mixed Arbitral Tribunal (The Peter Pázmány University),* the Permanent Court ordered the Respondent to restore the immovable property claimed by the University "in the condition in which it was before the application of the measures in question." The Court also ordered that the restored property had to be "freed from any measure of transfer, compulsory administration or sequestration."[440] The Court therefore effectively annulled any decisions regarding the property at issue.

368. International human rights bodies have regularly found that a conviction tainted by a due process violation or another violation of an internationally recognized right cannot stand. In the *Castillo Petruzzi* case, for example, the claimants challenged actions of the Peruvian government involved in their trial for treason before military courts with "faceless" judges presiding. In holding that Peru had violated the defendants' due process rights, the Inter-American Court of Human Rights observed:

> Failure to fulfill the requirements of due process renders the proceedings invalid. With that, the judgment is automatically invalid, as it does not meet the requirements for it to stand and

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[438] *Affaire Martini*, RIAA, vol. II, p. 973 (1930).

[439] *Id.*, at p.1002.

[440] *Appeal from a Judgment of the Hungary/Czechoslovak Mixed Arbitral Tribunal (The Peter Pázmány University), 1933, P.C.I.J., Series A/B, No. 61,* 208, 249.

> have the effects that normally follow from an act of this nature. It is up to the State, then, within a reasonable time period, to order a new trial that *ab initio* satisfies the requirements of due process of law . . .[441]

The Court further stated that:

> If the proceedings upon which the judgment rests have serious defects that strip them of the efficacy they must have under normal circumstances, then the judgment will not stand. It will not have the necessary underpinning, which is litigation conducted by law. The concept of nullification of a proceeding is a familiar one. With it, certain acts are invalidated and any proceedings that followed the proceeding in which the violation that caused the invalidation occurred, are repeated. This, in turn, means that a new judgment is handed down. The legitimacy of the judgment rests upon the legitimacy of the process.[442]

369. The obligation to annul a tainted judgment entails the obligation to eradicate all the effects of the judgment. In the *Cantoral Benavides* case, the Court ordered Peru to

> nullify all judicial or administrative, criminal or police proceedings against Luis Alberto Cantoral Benavides in connection with the events of the present case and...expunge the corresponding records.[443]

370. Similarly, in the *Cesti Hurtado Case*,[444] a Peruvian national had been arrested, deprived of his liberty and sentenced under the

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[441] *Castillo Petruzzi et al. case, Judgment of 30 May 1999, Inter-Am. Ct. H.R. (Ser. C) No. 52 (1999),* para. *221.*

[442] *Id.,* para. 219.

[443] *Cantoral Benavides case, Reparations, Judgment of December 3, 2001, Inter-Am. Ct. H.R. (Ser. C) No. 88 (2001),* para. *78.*

[444] *Cesti Hurtado Case, Judgment of 29 September, 1999, Inter-Am. Ct. H.R. (Ser.C) No. 56 (1999).*

military justice system, despite a *habeas corpus* action ordering that the alleged victim should be separated from the proceedings under the military justice system and that his freedom should be respected.[445] Peru rejected the Commission's demands that the Court "should annul the whole proceeding against the victim by the Peruvian military tribunals as well as all the effects of the judgment that was pronounced in irregular proceedings."[446] Peru argued that the grant of such a request would "result in procedural chaos, destabilizing the system of laws of the Peruvian State" and that the annulment demand was "extravagant and constitutes an attack on the sovereignty of the Peruvian State."[447] Rejecting Peru's position, the Court held that the proceeding under the military justice system had deprived Mr. Cesti of due process rights, and it therefore ordered "that the State must annul this proceeding and all the effects derived from it."[448]

371. Unsurprisingly, authors examining the consequences of violations of the Vienna Convention in U.S. death penalty proceedings have advocated that *restitutio in integrum* consist of the *vacatur* of the convictions and sentences. Professor Kadish, for example, explains that

> full effect cannot be given to the Article [36] once a foreign national has been convicted in violation of its provision unless a new trial is granted. A correct remedy necessarily demands a new trial in which the foreign national has full access to the cultural bridge envisioned by the world delegates of the Vienna Convention.[449]

372. Professor Quigley observes that

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[445] *Id.*, para. 3.

[446] *Id.*, para. 190 (internal quotations omitted).

[447] *Id.*, para. 191 (internal quotations omitted).

[448] *Id.*, para.194.

[449] M. Kadish, Article 36 of the Vienna Convention on Consular Relations: A Search for the Right to Consul, 18 *Michigan Journal of International Law* (1997) at 610-611.

> in the face of a failure to notify, a conviction must be reversed. This is a straightforward application of the requirement, in the law of state responsibility, of restoring the *status quo* before a violation.[450]

373. *Vacatur* of the conviction and sentences of the fifty-four Mexican nationals is essential to *restitutio in integrum* here because it is literally the only way to restore the *status quo ante* the internationally wrongful act.[451] Only by relieving these nationals of the legal effect of their tainted convictions and sentences will this Court ensure the restoration of a situation in which a fair proceeding may go forward.

b. Mexico Is Entitled in Any Future Criminal Proceedings Against Its Nationals to the Exclusion of Evidence Obtained in Breach of Article 36.

374. As an aspect of *restitutio in integrum*, Mexico is also entitled to an order that in any subsequent criminal proceedings against the

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[450] J. Quigley, LaGrand: A Challenge to the U.S. Judiciary, 27 *Yale Journal of International Law* (2002) at 437.

[451] Professor Mann, for example, writes:

> Obviously the problem arises only where it is a juristic act such as legislation, an executive order or a judicial decision that is alleged to be tortious. In such cases it may happen that nullity, and possibly a judicial declaration of nullity is the only effective method or at least the necessary concomitant of an effective method for the protection of a victim State.

F.A. Mann, The Consequences of an International Wrong in International and National Law, 48 *Brit. YB Int'l L.* (1976-1977) at p. 6. Mann then cites with approval the view of Sir Hersch Lauterpacht that "the absence of more direct means of enforcement tends to endow the principle of nullity of illegal acts with particular importance in the international sphere." *Id. (citing* H. Lauterpacht, Recognition in International Law 421 (1947)). *See also* I. Brownlie, *State Responsibility* (1983), p. 210 ("to achieve the object of reparation tribunals may give 'legal restitution' in the form of a declaration that . . . the relevant act of the executive, legislature or judicial organs of the respondent state, is a nullity in international law").

nationals, statements and confessions obtained prior to notification to the national of his right to consular assistance be excluded. The exclusion of this evidence in these circumstances would comport with the exclusionary rule, a general principle of law under Article 38(1)(c) of the Court's Statute.

375. The exclusionary rule applies in both common law and civil law jurisdictions and requires the exclusion of evidence that is obtained in a manner that violates due process obligations. For example, under United States law, evidence obtained in violation of basic due process rights must be excluded from use at trial against the defendant.[452] In the United Kingdom and Canada, confessions obtained in violation of domestic law, including applicable human rights obligations, are excluded as a matter of law so as not to jeopardize the fairness and justice of the proceedings.[453] Indeed, courts in the United Kingdom have specifically excluded confessions obtained by the police in procedures tainted by a violation of the foreign national's consular rights.[454]

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[452] *See supra* Chapter III.

[453] For the United Kingdom, section 76 of the Police and Criminal Evidence Act of 1984 mandates the exclusion of confessions that are obtained in violation of United Kingdom law, consistently with the European Convention on Human Rights. *See Re Arrows* (No. 4), *Hamilton v. Naviede* [1994] 3 All ER 814, 821. *See also* D. Feldman, Regulating Treatment of Suspects in Police Stations: Judicial Interpretation of Detention Provisions in the Police and Criminal Evidence Act 1984, *Criminal Law Review* (1990) p. 463.

For Canada, the 1982 Constitution's Charter of Rights and Freedoms, Section 24(2) declares that "where...a court finds that evidence was obtained in a manner that infringed or denied any of the rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute." The Canadian Supreme Court has found that §24(2) "does not confer a discretion on the [trial] judge but a duty to admit or exclude as result of his finding [of a disrepute.]" *The Queen v. Collins*, 33 C.C.C.(3d) 1, 13 (1987).

[454] *R. v. Bassil and Mouffareg* (1990) 28 July, Acton Crown Court, HHJ Sich. Reported in *Legal Action* 23, December 1990.

376. Civil law jurisdictions have also recognized the important role of the exclusionary rule. For example, Germany,[455] France,[456] and Italy[457] all require courts to exclude evidence, particularly confessions, when obtained in violation of basic principles of due process. Likewise, the Japanese Constitution and Code of Criminal Procedure provide explicit legal provisions regarding the application of the exclusionary rule to confessions.[458] Article 206 of the Mexican Federal Code of Criminal Procedure likewise contains a general exclusionary rule by providing that evidence obtained in violation of the applicable law is inadmissible.[459]

377. The preponderant use of the exclusionary rule in domestic law proceedings has led to its recognition in the procedural rules of

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[455] *See, e.g.*, section 136 German Strafprozessordnung. In addition, German courts have found that confessions obtained in violation of the accused's rights under the Strafprozessordnung, such as the rights to counsel or silence, also must be excluded. *See, e.g.*, BGH Judgment 27 February 1992 in 22 NJW 1463 (1992)(citing United States, British, Danish, Dutch and Italian precedent to mandate exclusion of confessions garnered in absence of police warnings as to accused's rights to counsel or silence).

[456] *See* articles 170(1), 170(2) and 59(3) of the French Code de Procédure Pénale.

[457] Italian law categorically bars confessions from trial unless the confession is given in the attorney's presence. *See, e.g.*, Decision of the Constitutional Court of May 23, 1991, 259 Gazz. Uff. Article 191(1) of the Italian Criminal Procedure Code of 1989, Codice di Procedura Penale, expressly provides that "[e]vidence acquired in violation of prohibitions established by law cannot be used [in court]."

[458] *See* Kenpo [The Constitution of Japan], Article 38(2); Keisoho [The Code of Criminal Procedure], Law No. 131 of 1948, Article 319(1).

[459] Under Article 20 of the Mexican Constitution, Article 287, section II, of the Federal Code of Criminal Procedure and Article 249, section IV, of the Federal District Code of Criminal Procedure, a confession obtained from a criminal defendant is not admissible against that defendant unless the confession was taken in front of the Ministerio Público or judge and in the presence of counsel to the defendant. Article 287 expressly excludes confessions obtained by the judicial police.

international criminal bodies. Thus, Rule 95 of the International Criminal Tribunal for the Former Yugoslavia is entitled "exclusion of certain evidence" and provides that "[n]o evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings."[460] Like the other provisions of the ICTY's Rules of Evidence, this rule reflects a "concept[. . .] generally recognized as being fair and just in the international arena."[461]

378. The affirmation of this general principle of law is further evident in Article 69(VII) of the Rome Statute of the International Criminal Court, which rules out evidence obtained by means of a violation of the procedural due process guarantees of the Statute or of internationally recognized human rights where the violation (a) casts substantial doubt on the reliability of the evidence, or (b) if the admission would seriously damage the integrity of the proceedings.[462] The protection is a broad one intended to exclude any evidence that is obtained by means of a serious violation of due process or other human rights that would endanger the integrity of the proceedings.[463]

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[460] International Criminal Tribunal for the Former Yugoslavia, Rules of Procedure and Evidence, UN Doc. IT/32/rev. 12 (1996), entered into force 14 March 1994, amendments adopted 8 January 1996. Rule 95 works in tandem with rule 89(D), which empowers trial judges with the ability to exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial. *See, e.g., Prosecutor v. Tadic*, Decision on the Defense Motion on Hearsay, ICTY Case No. IT-94-1-T, 5 Aug. 1996, para. 18. *See also* R. May & M. Wierda, International Criminal Evidence (2002), 295, para. 8.84 ("The most obvious remedy for the infringement of the fair trial rights of the accused is the exclusion of any evidence obtained as a result of the infringement.").

[461] 1994 Annual Report, U.N. Docs A/49/342, S/1994/1007, paras. 52-54.

[462] *Rome Statute of the International Criminal Court*, 37 International Legal Materials 999 (1998), Art. 69 (VII).

[463] *See* C. Safferling, *Towards an International Criminal Procedure*, (2001) p. 296; H.J. Behrens, Investigation, Trial and Appeal in the International Criminal Court Statute, *6 Eur.J.Crime Cr.L.Cr.J.* (1998) p. 120 ("[A]lmost all imaginable cases of violations of human rights" will make evidence inadmissible."); D.

379. In light of the due process aspect inherent in the application of the exclusionary rule, international human rights treaties have provided for the application of the exclusionary rule. Article 15 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, for example, provides that "any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made." Similarly, Article 8(3) of the American Convention of Human Rights[464] establishes the exclusionary rule of evidence as part of the right to a fair trial by expressly declaring that "[a] confession of guilt by the accused shall be valid only if it is made without coercion of any kind." The Inter-American Commission for Human Rights has acted consistently with this principle in its findings.[465]

380. The status of the exclusionary rule as a general principle of law permits the Court to order that the United States is obligated to apply this principle in respect of statements and confessions given to United States law enforcement officials prior to the accused Mexican nationals being advised of their consular rights in any subsequent criminal proceedings against them.

c. Mexico Is Entitled To an Order Prohibiting Application of Municipal Law Bars.

381. To restore the *status quo ante*, and to ensure that full effect is given the purposes for which the Article 36 rights were intended, the Court should also prohibit the United States from applying any procedural penalty for a Mexican national's failure timely to raise a claim or defense based on the Vienna Convention – in the form of any state or federal doctrine of procedural default, bar of retroactivity, or

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Piragoff, *Commentary on the Rome Statute*, in Trifterer (ed.), Art. 69, Nos. 76-80 (1999).

[464] Adopted at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, 22 November 1969.

[465] *See, e.g., Garcia v. Peru, Report No. 1/95, Case 11.006, Inter-Am. Cm. H.R. 71, OEA/Ser.L/V/II.88, Doc. 9 rev. (1995)*, at 103.

similar rule preventing a United States court from reaching the merits of the claim or defense – where competent authorities of the United States have breached their obligation to advise the national of his or her rights under the Vienna Convention.[466]

382. Without such a prohibition, these procedural penalties would have the effect of frustrating any attempt by the national to assert the Vienna Convention rights that Mexico seeks to vindicate here. Indeed, in *LaGrand*, even in a remedial posture that did not implicate *restitutio*, the Court has already held that the United States has an obligation to allow review and reconsideration of convictions and sentences that takes account of Vienna Convention claims.[467]

383. Equally, the Court should prohibit the United States from applying any municipal law doctrine or judicial holding that prevents a court in the United States from providing a remedy, including the relief to which this Court holds that Mexico is entitled here, to a Mexican national whose Article 36 rights have been violated.[468] Only in that manner would Mexico and its national be restored, in any subsequent criminal proceedings against the national, to a situation in which their Article 36 rights might be respected.

384. Finally, the Court should prohibit the United States from applying any municipal law doctrine or judicial holding that requires an individualized showing of prejudice as a prerequisite to relief for the Vienna Convention violations shown here.[469] As Mexico has demonstrated,[470] consular notification and assistance are fundamental due process rights whose deprivation renders a criminal proceeding – and, in particular, a criminal proceeding in which the death penalty is sought – fundamentally unfair. In these circumstances, too, placing the burden of

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[466] *See* Chapter IV.B.2.

[467] *LaGrand*, para. 128(4) and para. 128(7).

[468] *See* Chapter IV.B.2.

[469] *See supra* Chapter III.C.3.

[470] *See supra* Chapter V.

showing prejudice on the victim of the violations would deny to Mexico and its nationals the full effect of the Article 36 provisions. Hence, to restore the *status quo ante* in which these rights may be fully exercised, the Court should preclude any such requirement.

3. The Re-establishment of the *Status Quo Ante* Is Not Materially Impossible and Is Proportionate to the Injury Caused.

385. Article 35 of the Articles on State Responsibility provides for restitution "provided and to the extent that" restitution neither is "materially impossible" nor involves a "burden out of all proportion to the benefit deriving from restitution instead of compensation." Neither of these provisos applies here.

a. Re-establishment of the *Status Quo Ante* Is Possible.

386. Restitution would be materially impossible here only if the Mexican nationals subject to this proceeding had been executed.[471] It is evident that it is not materially impossible for the United States to provide for *vacatur* of the convictions and sentences, the exclusion from any future criminal proceedings of evidence illegally obtained, and the prohibition of municipal law bars to hearing Vienna Convention claims on their merits and providing effective relief for those claims.

387. The United States may not adduce inconvenience or impracticability to avoid *restitutio in integrum*. As the ILC noted in its Commentary to Article 35:

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[471] By their Applications, both Paraguay and Germany sought restitution in *Vienna Convention on Consular Relations* and *LaGrand*, respectively. *Vienna Convention on Consular Relations (Paraguay v. United States of America), Application of the Republic of Paraguay*, para. 25; *LaGrand (Germany v. United States of America), Application of Germany*, para. 15. However, in each instance, the nationals of these States were executed shortly after the filing of the Applications. Paraguay did not continue its case to the merits; Germany no longer sought restitution during the merits phase of *LaGrand*.

> restitution is not impossible merely on grounds of legal or practical difficulties, even though the responsible State may have to make special efforts to overcome these.[472]

388. As a matter of fundamental principles of international law, the United States also may not rely on its federal system or its internal law to avoid its obligation to make full reparations on the grounds of material impossibility.[473] In any event, in this proceeding, it is uncontested that as a matter of its own internal law, the United States is fully capable of implementing any judgment this Court may render.[474]

b. No Burden Out of Proportion to the Benefit Deriving from Restitution Instead of Compensation.

389. Restitution would not impose a disproportionate burden on the United States. The only "burden" that restitution would impose on the United States here would be the need to conduct new trials and sentencing proceedings in the cases subject to this proceeding, so that in

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[472] Commentary to Art. 35 of the Articles on State Responsibility, para. 8.

[473] *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory, Advisory Opinion, 1932, P.C.I.J., Series A/B, No. 44*, p. 4. ("a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force"). *See also Free Zones of Upper Savoy and the District of Gex, Free Zones of Upper Savoy and the District of Gex, Judgment, 1932, P.C.I.J., Series A/B, No. 46*, p. 167; *Greco-Bulgarian "Communities", Advisory Opinion, 1930, P.C.I.J., Series B, No. 17*, p.32; *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion of 11 April 1949, I.C.J. Reports 1949*, p. 180; *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion of 29 April 1999, I.C.J. Reports 1999*, para. 62.

[474] *Avena and Other Mexican Nationals (Mexico v. United States of America), Request for the Indication of Provisional Measures of Protection Submitted by the Government of the United Mexican States*, paras. 22-29 (setting out the means available to the United States to ensure compliance with the Court orders); *Oral Proceedings*, CR 2003/2 (Thessin), para. 3.43 ("we will not debate with Mexico the legal principles involved in implementing United States international law obligations").

those proceedings the United States could conform to its obligations under the Vienna Convention, a treaty to which it has been a party for over thirty years. All criminal justice systems, and certainly that of the United States, provide for retrial and resentencing in cases in which the original proceedings have been flawed, and the Court would therefore impose no novel requirement by ordering restitution in the form of *vacatur*. Likewise, United States courts are well accustomed to excluding evidence illegally obtained, and an order not to apply municipal law bars would equate simply to an order to determine cases on their merits. In other words, restitution would impose no burden here at all.[475]

390. By contrast to the simple requirements to be imposed on the United States in restoring the *status quo ante*, the injury to be suffered by Mexico's nationals without the requirement to make restitution is the greatest of all: the loss of life. The injury suffered by Mexico is equally grave as it involves the ongoing denial of Mexico's international law rights: the abrogation of *pacta sunt servanda*. There is no comparison between the burden that would be imposed on Mexico by a denial of restitution and that which the United States would bear on a grant, let alone a disproportionate burden in the United States's favor.

C. THE UNITED STATES MUST CEASE ITS UNLAWFUL CONDUCT AND OFFER MEXICO GUARANTEES OF NON-REPETITION

391. In addition to the reparations sought in relation to Mexico's own rights and those of its nationals on death row, Mexico seeks orders from this Court that the United States (1) cease its violations of Article 36 in respect of Mexico and its nationals, and (2) provide Mexico with guarantees of non-repetition of the illegal acts described in this

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[475] Any balancing permitted between compensation and restitution must be based on considerations of equity and reasonableness, "with a preference for the position of the injured State in any case where the balancing process does not indicate a clear preference for compensation as compared with restitution." Article 35(b) of the Articles on State Responsibility. Mexico does not seek compensation here, and no such balancing would be possible, because compensation could not vindicate in any way the rights of the fifty-four Mexican nationals to consular notification and assistance in a proceeding at which their life and liberty are at stake.

Memorial. Cessation and guarantees are well-established remedies under international law, as they "are aspects of the restoration and repair of the legal relationship affected by the breach."[476]

1. The United States Has Regularly Violated and Continues Regularly to Violate Mexico's Article 36 Rights and Those of Its Nationals.

392. In *LaGrand*, by its fourth submission, Germany sought assurances of non-repetition.[477] Addressing Germany's request for general assurances, the Court took note of the information provided by the United States of its efforts to raise awareness of consular protection rights through the distribution of pamphlets and pocketcards and by the conduct of training programs.[478] The Court held:

> If a State, in proceedings before this Court, repeatedly refers to substantial activities which it is carrying out in order to achieve compliance with certain obligations under a treaty, then this expresses a commitment to follow through with the efforts in this regard. * * * * The Court considers that the commitment expressed by the United States to ensure implementation of the specific measures adopted in performance of its obligations under Article 36, paragraph 1 *(b)*, must be regarded as meeting Germany's request for a general assurance of non-repetition.[479]

The United States again referred to this program during the provisional measures phase of this proceeding.[480]

393. Regrettably, however, the United States program, whatever its components, has proven ineffective to prevent the regular and continuing

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[476] Commentary to Art. 30 of the Draft Articles on State Responsibility, para. 1.

[477] *LaGrand*, paras. 117-127.

[478] *LaGrand*, paras. 121, 123 and 124.

[479] *Id.*

[480] CR 2003/2 (Lauterpacht), para. 4.17; CR 2003/4 (Brown), at 10-11.

violation by its competent authorities of consular notification and assistance rights guaranteed by Article 36.

394. *First*, competent authorities of the United States regularly fail to provide the timely notification required by Article 36(1)(b) and thereby to frustrate the communication and access contemplated by Article 36(1)(a) and the assistance contemplated by Article 36(1)(c).[481] These violations continue notwithstanding the Court's judgment in *LaGrand* and the program described there.[482]

395. The facts of the fifty-four cases detailed by Mexico in this proceeding makes clear the historic noncompliance by the United States with its Article 36 obligations.[483] The first arrest of the Mexican nationals subject to this Application occurred on 3 March 1979, and the most recent was 4 January 1999.

396. Mexico has demonstrated, moreover, that the pattern of regular noncompliance continues. During the first half of 2003, Mexico has identified at least one hundred cases in which Mexican nationals have been arrested by competent authorities of the United States for serious felonies but not timely notified of their consular notification rights.[484] The actual number is almost certainly far larger, because these cases

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[481] *See supra* Chapter IV.A. The United States' "self-described practice of 'investigating reports of violations and apologizing to foreign governments, and working with domestic law enforcement to prevent further violations,'" remains, in the words of one United States federal judge, "equivalent to securing enforcement by a toothless, clawless lion." *United States v. Lombera-Camorlinga*, 206 F.3d 882, 888 (9th Cir. 1999) (Boochever, J., dissenting).

[482] *See supra* Chapter III.E. (referring to the comprehensive survey undertaken by the Mexican Foreign Ministry in respect of its 45 consulates in the United States); Declaration of Ambassador Roberto Rodríguez Hernández, Exhibit B (detailing cases).

[483] *See Avena and Other Mexican Nationals (Mexico v. United States of America), Application of Mexico*, paras. 67-267, and Declaration of Roberto Rodríguez Hernández, Exhibit A (detailing cases) , Annex 7.

[484] *See* Declaration of Ambassador Roberto Rodríguez Hernández, Exhibit B (detailing cases) , Annex 7.

suggest, by the very nature of the violation, that there must be many others of which Mexican consulates remain unaware.

397. *Second*, courts in the United States continue to apply doctrines of procedural default and non-retroactivity that prevent those courts from reaching the merits of Vienna Convention claims, and those courts that have addressed the merits of those claims (because no procedural bar applies) have repeatedly held that no remedy is available for a breach of the obligations of Article 36.[485] Of course, the United States' education and training program described in *LaGrand*,[486] even if fully effective on its own terms, could have no effect whatsoever on these legal rules and doctrines. Likewise, the United States' reliance on clemency proceedings to meet *LaGrand*'s requirement of review and reconsideration represents a deliberate decision to allow these legal rules and doctrines to continue to have their inevitable effect.[487] Hence, the United States continues to breach Article 36(2) by failing to give full effect to the purposes for which the rights accorded under Article 36 are intended.

2. Mexico Is Entitled to Cessation and Guarantees of Non-Repetition.

398. Article 30 of the ILC Articles on State Responsibility provides that States are to cease wrongful conduct and offer guarantees of non-repetition where the circumstances so require. Such orders are appropriate here.

399. *First*, the restoration of Mexico's legal relationship with the United States under the Vienna Convention necessarily requires the United States to cease its ongoing violations of that treaty. The requirement of cessation represents a fundamental concern for compliance with international obligations and for upholding the rule of law.[488] In seeking an order from this Court that the United States timely

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[485] *See supra* Chapter III.C.

[486] *LaGrand*, paras. 121, 123 and 124.

[487] *See supra* Chapter IV.B.4.

[488] The International Law Commission thus explains: "The responsible State's obligation of cessation thus protects both the interests of the injured State or

notify Mexican nationals of their consular rights and give full effect to this obligation in its domestic law, Mexico does nothing more than ask the Court to uphold the fundamental tenet of *pacta sunt servanda*.

400. The Tribunal in the *Rainbow Warrior Arbitration* identified "two essential conditions intimately linked" for the requirement of cessation to arise, "namely that the wrongful act has a continuing character and that the violated rule is still in force at the time in which the order is issued."[489] There is no question here that the obligations of the Vienna Convention have been and remain in force between the parties, and the wrongful conduct in this case indisputably has a continuing character.

401. As to Article 36(1), the pattern of noncompliance is pronounced and has extended for a lengthy period. In any event, cessation "encompasses situations where a State has violated an obligation on a series of occasions, implying the possibility of further repetitions."[490]

402. As to Article 36(2), there is no dispute that the municipal law rules and doctrines that have repeatedly prevented the United States from giving full effect to the purposes of Article 36 remain in full force and effect. Maintaining these domestic impediments continues the internationally wrongful act.[491]

403. *Second*, the United States must not only cease its current wrongful conduct, but it must also take steps to prevent future violations

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States and the interests of the international community as a whole in the preservation of, and reliance on, the rule of law." Commentary to Art. 30 of the Articles on State Responsibility, para. 5.

[489] *Rainbow Warrior, UNRIAA*, vol. XX, p. 217 (1990), at p.270, para. 114.

[490] Commentary to Art. 30 of the Articles on State Responsibility, para. 3

[491] Ago, in his fifth report as Special Rapporteur to the ILC, provided examples of wrongful continuing acts, including "the act of maintaining in force a law which the State is internationally required to repeal, or conversely, the act of not passing a law that is internationally required." ILC Yearbook (1976), vol. II (Part One), p. 22, document A/CN.4/291 and Add. 1 and 2, para. 62.

of the same kind. Guarantees of non-repetition are sought as a preventive measure so that future violations of the same type will not occur again,[492] especially in the face of a pattern of international law violations.[493] This Court did not question whether assurances could be granted in *LaGrand*, but moved directly into a consideration of what assurances should be afforded in order to prevent recurrent violations of Articles 36(1) and (2) by the United States.

404. As Mexico has demonstrated, the Court can no longer accept as adequate the assurances provided in *LaGrand*. When considering a guarantee of non-repetition, "[t]he measures envisaged may involve formal assurances from the wrongdoing state, instructions to government agents, or adoption of certain conduct considered preventive in nature."[494] Here, an apology or simple verbal assurance of non-repetition would not suffice.[495] Mexico recognizes that the United States cannot guarantee that no future violations of Article 36 will ever occur.[496] But international law requires that the United States take concrete steps designed to ensure that it will achieve regular compliance with its Article

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[492] Commentary to Art. 30 of the Articles on State Responsibility, para. 1.

[493] For example, the U.S. Secretary of State notified Spain of its demand to prevent unlawful visitation and search of United States' merchant vessels by Spanish armed cruisers. Letter of Secretary of State Evarts to the Minister to Spain, Mr. Fairchild, of 11 Aug. 1880, in: J. Moore (ed.), *A Digest of International Law* (1906), vol. 2, pp. 907 (seeking "a distinct assurance against their repetition"). The Human Rights Committee has frequently called on States party to the ICCPR to take steps to ensure that similar violations will not occur in the future and that those States are under an obligation to take immediate steps to ensure strict observance of the obligations set out in the Covenant. *See* D. Shelton, *Remedies in International Human Rights Law* (1999) p. 143.

[494] D. Shelton, *Remedies in International Human Rights Law* (1999) p.102 (discussing reparations for injuries to aliens under the rules of State Responsibility).

[495] As the ILC notes, "Assurances are normally given verbally, while guarantees of non-repetition involve something more." Commentary to Art. 30 of the Draft Articles on State Responsibility, para. 12.

[496] *LaGrand*, para. 124.

36 obligations. Requests for specific steps or for specific instructions are commonly granted in international law,[497] and are clearly required in this case.

405. Accordingly, Mexico is entitled to an order requiring that the United States take all legislative, executive, and judicial steps necessary to (1) ensure that the regular and continuing violations of the Article 36 consular notification, access, and assistance rights of Mexico and its nationals cease, and (2) guarantee that its competent authorities, of federal, state, and local jurisdiction, maintain regular and routine compliance with their Article 36 obligations.

406. In addition, Mexico is entitled to an order that the United States take all legislative, executive, and judicial steps necessary to ensure that its judicial authorities cease applying, and guarantee that in the future they will not apply, (1) any procedural penalty for a Mexican national's failure timely to raise a claim or defense based on the Vienna

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[497] *See, e.g., Trail Smelter (United States / Canada)*, III U.N.R.I.A.A. 1905, 1934 (1938, 1941); Martens, *Nouveau Recueil*, 2nd series, vol. XXIX, pp. 456, 486 (describing the need for the United Kingdom to issue "instruction to the British Naval Commanders to molest no German merchantmen in places not in the vicinity of the seat of war" following the seizure of two German ships by the British Navy during the Boer war). García-Amador cited the following examples of the United States providing specific assurances of non-repetition:

> After the lynching of Italian citizens in Tallulah, President McKinley repeatedly asked Congress to 'confer upon the federal courts jurisdiction in this class of international cases where the ultimate responsibility of the Federal Government may be involved.' Similarly, in connection with the *Japanese schools* incident (1906), President Roosevelt requested Congress to amend the criminal and civil law of the United States to enable the Executive to protect the rights of aliens in conformity with the provisions of international agreements. Previously, in connection with the case of *McLeod*, who had been arrested in New York state for murder during the destruction of the *Carolina* (1840), it has been held that the federal authorities were not competent to deal with the British Government's claim. In order to prevent any recurrence of that difficulty, Congress amended the Habeas Corpus Act in 1842.

F.V. García-Amador, *The Changing Law of International Claims*, Vol. II, (1984), at pp. 587-88 (emphasis in original, footnotes omitted).

Convention – in the form of any state or federal doctrine of procedural default, bar of retroactivity, or similar rule preventing a United States court from reaching the merits of the claim or defense – where competent authorities of the United States have breached their obligation to advise the national of his or her rights under the Convention; (2) any municipal law doctrine or judicial holding that prevents a court in the United States from providing a remedy, including the relief to which this Court holds that Mexico is entitled here, to a Mexican national whose Article 36 rights have been violated; and (3) any municipal law doctrine or judicial holding that requires an individualized showing of prejudice as a prerequisite to relief for the Vienna Convention violations shown here.

VII.

SUBMISSIONS

407. FOR THESE REASONS, the submissions of the Government of Mexico respectfully requests the Court to adjudge and declare

(1) that the United States, in arresting, detaining, trying, convicting, and sentencing the fifty-four Mexican nationals on death row described in Mexico's Application and this Memorial, violated its international legal obligations to Mexico, in its own right and in the exercise of its right of diplomatic protection of its nationals, as provided by Article 36 of the Vienna Convention;

(2) that the obligation in Article 36(1) of the Vienna Convention requires notification before the competent authorities of the receiving State interrogate the foreign national or take any other action potentially detrimental to his or her rights;

(3) that the United States, in applying the doctrine of procedural default, or any other doctrine of its municipal law, to preclude the exercise and review of the rights afforded by Article 36 of the Vienna Convention, violated its international legal obligations to Mexico, in its own right and in the exercise of its right of diplomatic protection of its nationals, as provided by Article 36 of the Vienna Convention; and

(4) that the United States is under an international legal obligation to carry out in conformity with the foregoing international legal obligations any future detention of or criminal proceedings against the fifty-four Mexican nationals on death row and any other Mexican national in its territory, whether by a constituent, legislative, executive, judicial or other power, whether that power holds a superior or a subordinate position in the organization of the United States, and whether that

power's functions are international or internal in character;

and that, pursuant to the foregoing international legal obligations,

(1) Mexico is entitled to *restitutio in integrum*, and the United States therefore is under an obligation to restore the *status quo ante*, that is, reestablish the situation that existed at the time of the detention and prior to the interrogation of, proceedings against, and convictions and sentences of, Mexico's nationals in violation of the United States' international legal obligations, specifically by, among other things,

(a) vacating the convictions of the fifty-four Mexican nationals;

(b) vacating the sentences of the fifty-four Mexican nationals;

(c) excluding any subsequent proceedings against the fifty-four Mexican nationals any statements and confessions obtained from them prior to notification of their rights to consular notification and access;

(d) preventing the application of any procedural penalty for a Mexican national's failure timely to raise a claim or defense based on the Vienna Convention where competent authorities of the United States have breached their obligation to advise the national of his rights under the Convention;

(e) preventing the application of any municipal law doctrine or judicial holding that prevents a court in the United States from providing a remedy, including the relief to which this Court holds that Mexico is entitled here, to a Mexican national whose Article 36 rights have been violated; and

(f) preventing the application of any municipal law doctrine or judicial holding that requires an

individualized showing of prejudice as a prerequisite to relief for the violations of Article 36;

(2) the United States, in light of the regular and continuous violations set forth in Mexico's Application and Memorial, is under an obligation to take all legislative, executive, and judicial steps necessary to:

(a) ensure that the regular and continuing violations of the Article 36 consular notification, access, and assistance rights of Mexico and its nationals cease;

(b) guarantee that its competent authorities, of federal, state, and local jurisdiction, maintain regular and routine compliance with their Article 36 obligations;

(c) ensure that its judicial authorities cease applying, and guarantee that in the future they will not apply:

(i) any procedural penalty for a Mexican national's failure timely to raise a claim or defense based on the Vienna Convention where competent authorities of the United States have breached their obligation to advise the national of his or her rights under the Convention;

(ii) any municipal law doctrine or judicial holding that prevents a court in the United States from providing a remedy, including the relief to which this Court holds that Mexico is entitled here, to a Mexican national whose Article 36 rights have been violated; and

(iii) any municipal law doctrine or judicial holding that requires an individualized showing of prejudice as a prerequisite to relief for the Vienna Convention violations shown here.

408. Mexico reserves the right to modify or extend the terms of its requested judgment, as well as the grounds invoked in this Memorial.

New York, 18 June 2003

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