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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.*

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*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.*

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*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.*



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 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 subparagraph 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.

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)*, 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.

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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.

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#### 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:



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*."

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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" (*ibid.*, 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.

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#### 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 violation, not 'review and reversal', not across-the-board exclusions of evidence or nullification of convictions simply because a breach of Article 36 (1) occurred and without regard to its effect upon the conviction and sentence and, not . . . '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



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 U.S. 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.



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.

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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.

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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.

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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.

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