INTERNATIONAL COURT OF JUSTICE

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

COUNTER-MEMORIAL OF THE UNITED STATES OF AMERICA

VOLUME I
TEXT OF THE COUNTER-MEMORIAL

3 NOVEMBER 2003

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CHAPTER I

INTRODUCTION

1.1 The facts in the case Mexico has brought to the Court are many and complex. In important respects they are also in dispute. Mexico invites this Court to re-determine the facts and re-weigh the evidence of fifty-four separate criminal cases. These cases have, collectively, been the subject of hundreds of judicial proceedings, thousands of hours of testimony and argument, and extended deliberation by judges and juries, followed in many cases with review by other judges. The records of these proceedings are voluminous. Mexico's summary abstracts of the cases draw selectively from these records, and then imply that the Court can easily make the determinations of fact necessary to support the legal conclusions Mexico proposes. The most casual review of the cases demonstrates, however, that this is not so.

1.2 Some of the fifty-four cases involve defendants who definitely or probably were United States citizens at the time of their arrest. Some involve Mexican citizens who affirmatively represented themselves as United States citizens to United States – and in one case to Mexican – authorities. Other arrested individuals gave no specific indication of their nationality, but presented strong indicia of United States citizenship, including significant contacts and familiarity with the United States and its legal system. Five offered confessions or inculpatory statements prior to being detained and taken into custody, before the requirements of Article 36(1)(b) of the Vienna Convention on Consular Relations[1] would have been

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[1] Vienna Convention on Consular Relations, 24 Apr. 1963, 596 U.N.T.S. 261 (hereinafter, this Convention will be referred to as the "VCCR"); Vienna Convention on Consular Relations Concerning the Compulsory Settlement

triggered. In a substantial number of the cases, Mexican consular officers knew of the detention before trial and were able to offer consular assistance before and at trial, and throughout later judicial proceedings.

1.3 Mexico shares little of this with the Court. Instead, it makes unfounded yet categorical assertions, painting a callous system that disregards the rights and guarantees of due process of law to disadvantaged and unsophisticated Mexican nationals simply because they are foreigners. It posits prosecutors, judges and juries who conspire together toward this end. It portrays a criminal justice system that features convictions and sentences unsupported by evidence and dependent on unconscionable procedural abuses.

1.4 In fact, the criminal justice systems in the United States guarantee the very procedural rights and protections that Mexico asserts its nationals have been deprived of in the fifty-four cases. Defendants are informed of and given their due process rights, and judges enforce those rights. Those not fluent in English are provided with translators, or are addressed in their mother tongue. Custodial interrogation is terminated (or not commenced at all) once a detainee invokes his absolute right to silence or requests a lawyer, and he or she must be informed of these rights at the time of his arrest. A lawyer assigned to represent the detainee must be an effective one, and is provided at no charge to an indigent defendant. Defendants are entitled, at state expense, to the assistance necessary to offer mitigating evidence before sentencing. If the system fails in any respect to meet these obligations, and that failure is timely raised, the system can and will correct the error.

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of Disputes, 24 Apr. 1963, 596 U.N.T.S. 487 (hereinafter, this instrument will be referred to as the "Optional Protocol, VCCR"), Annex 23, Exhibit 1.

1.5 That these particular fifty-four defendants did not prevail at trial, or during appeals or collateral proceedings (for those whose cases have reached that stage), casts no doubt on the fairness and effectiveness of the criminal justice process in the United States. Quite the opposite. Where crimes have been committed, a fair and effective criminal justice system convicts the guilty and imposes the penalties prescribed in law. Conviction and sentence, however, do not conclude the criminal process in the United States. Many of these defendants may yet file briefs and argue their cases on appeal, so the outcome of their cases remains to be seen. Three have had their capital sentences commuted by executive clemency. None of the others has yet requested clemency review.

1.6 Mexico has failed in its Memorial to carry its burden of proving breaches of Article 36 in any of these cases. On one point, however, the Court may depend: if a breach of Article 36 has occurred in any of these fifty-four cases, the United States will provide for the review and reconsideration of their convictions and sentences.

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1.7 If the factual issues involved in this case are complex, the legal issues are not. They are, indeed, relatively straightforward because they are, for the most part, identical to those recently addressed by the Court in the *LaGrand* case (*Germany v. United States of America*)[2]: (1) What are the obligations owed to the sending State and its nationals under Article 36 of the VCCR; and (2) What is the proper remedy for breaches of those obligations. Mexico proposes that the Court find that the rights and remedies with respect to Mexican

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[2] *See generally LaGrand (Germany v. United States of America), Judgment, I.C.J. Reports 2001* (hereinafter, the judgment of the Court in this case will be referred to as "*LaGrand, Judgment*").

nationals under the Convention are different from those with respect to German nationals set out in *LaGrand*. The United States disagrees.

1.8 This Court announced its Judgment in *LaGrand* on 27 June 2001, barely two years ago. The judgment spelled out the obligations created under Article 36. It prescribed remedies in cases where those obligations are not carried out and foreign nationals are sentenced to severe penalties. In a Declaration accompanying the Court's Judgment, then-President Guillaume noted, with regard to the remedy announced by the Court, that it did not address the position of nationals of countries other than Germany. "However", he said, "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"[3].

1.9 Since the decision in *LaGrand*, the United States has conformed its conduct, for all foreign nationals, to the holding in that case. It has redoubled its efforts to press law enforcement officers to inform foreign nationals without delay that, if they wish, their consulate will be notified of their arrest. In cases where Article 36 has not been observed, the United States has undertaken within the context of its municipal laws to allow review and reconsideration of the conviction and sentence taking account of this fact.

1.10 Mexico, however, asks the Court to modify substantially the Judgment in *LaGrand*. It proposes an entirely novel interpretation of the obligations created by Article 36 and, notwithstanding President Guillaume's Declaration, a radically different remedy in cases where Article 36 obligations to Mexican nationals have not been carried out.

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[3] *LaGrand, Judgment* (Declaration of President Guillaume).

1.11 Its novel interpretation is that the consular official is, and was understood by the States Parties to be, a central player in the criminal process. Mexico argues that a foreign national must be informed not just "without delay" but "immediately" upon detention that he or she can request consular assistance; if such assistance is requested, all interrogation must stop until the consular official arrives to participate in the process. Yet the consular official has no obligation under the VCCR to act at all, much less without delay.

1.12 Mexico's case is founded on an implicit but incorrect assumption that the VCCR guarantees detained persons a right to consular assistance. It does not. It enables persons to seek assistance and consular officers to be informed of the detention of their nationals, so that the consular officers will be allowed – but not compelled – to give assistance within reasonable parameters and subject to receiving State laws and to sending State laws, regulations and instructions. The consular officer cannot be compelled either by a defendant or by any court to provide assistance, or to meet any particular standard of assistance. Whether assistance is actually provided is a matter solely for the consular officer to decide. The detained person may ask for assistance, but the VCCR affords him no claim for a remedy in his criminal case based on his consular officer's refused, untimely, or ineffective response.

1.13 In explaining its request for a different remedy, Mexico suggests that the Court in some way curtailed the remedy it prescribed in *LaGrand* because the German nationals involved in that case had been executed prior to the Court's judgment. But the Court knows well that its remedy in *LaGrand* was particularly designed to apply prospectively for living German nationals in future cases. President Guillaume's Declaration makes clear it was intended to apply in the cases of nationals of other States as well, including Mexican nationals.

1.14 Recognizing the difficulty involved in persuading the Court to adopt a different remedy for Mexican nationals, Mexico asks the Court to find that the United States is not actually providing them the remedy set out in *LaGrand*. Specifically, Mexico argues that the review and reconsideration of the convictions and sentences provided by the United States in its judicial proceedings, and in the clemency process, does not meet the Court's requirement.

1.15 Inasmuch as the clemency process is available in every case, Mexico's argument must focus particularly on this. Mexico must establish that the clemency process does not provide the review and reconsideration called for by the Court in *LaGrand*. If not, it will have failed in every case to demonstrate either a breach of Article 36(2)'s obligation to give full effect to the purposes for which the article is intended or that a proper remedy is not available for a violation of Article 36(1).

1.16 With so much depending on its carrying this point, Mexico's criticism of the clemency process in the United States is unusually vehement. In considering Mexico's argument, however, the Court should bear in mind: (1) The clemency process is established by law and operates in accordance with the law; (2) Every Mexican national convicted of a crime and sentenced to a severe penalty in the United States has the legal right to request clemency, basing his request on an alleged breach of Article 36 or on any other ground; and (3) In every such case, the clemency process allows for review and reconsideration taking account of the breach, and the clemency decision maker can vacate a conviction or modify a sentence when that is appropriate. In short, the clemency process "allow[s] the review and reconsideration" called for in *LaGrand*.

1.17 Essentially, Mexico asks the Court to find that the clemency system does not operate as it is supposed to. For this Court or, indeed, any international tribunal, to make such a far-reaching determination concerning a core aspect of a State's municipal legal system, would be unprecedented. To base such a finding on the meager and incomplete description of the United States' clemency process put forward in Mexico's Memorial would be reckless. Mexico presents a handful of tendentious affidavits and law review articles, assertions of disappointed defense counsel, unsupported statements challenging the competence and conscientiousness of state officials, and a highly selective characterization of a half-dozen clemency proceedings out of hundreds. None of this, in whatever strong rhetoric it may be presented, even begins to provide the Court with a record that would justify setting aside the presumption of regularity to which properly established domestic legal procedures of a State are entitled in this forum.

1.18 This Court's functions do not include making the kind of broad assessment of national legal processes Mexico is requesting here. The Court has consistently declined to assume such a role. Yet, Mexico's case depends vitally on the Court's reaching the conclusion that the clemency process does not provide a Mexican national with an opportunity to have his conviction and sentence reviewed taking account of an alleged violation of Article 36. But clemency is established precisely to take into account any factor that bears on the fairness or legitimacy of a conviction or sentence. And, indeed, in three of the ten states whose clemency process Mexico derides in this case, officials have *expressly* taken Article 36 violations into account.

1.19 Though its challenge to the clemency process is particularly vehement, Mexico's indictment of the United States criminal justice systems does not limit itself to clemency. Mexico's remedial requests illustrate starkly that it seeks to

have this Court assume many of the functions of a court of criminal appeal. National courts of criminal appeal determine whether lower courts have made proper findings of fact and ensure that the law is applied correctly to the facts. National courts of criminal appeal (or elected legislatures) determine how rights can be vindicated within the legal system and determine when it is appropriate to establish rules that evidence will or will not be used or that new trials will or will not be granted for procedural or substantive violations of law. These are not the functions of this Court.

1.20 The Court should understand just how extraordinary, indeed extreme, Mexico's requests for remedies are in this case. Not a single criminal justice system in the world – not one among the more than 160 Parties to the VCCR – operates in accordance with the rules Mexico would have this Court adopt and impose on the United States. Mexico's own system does not conform to them. Criminal justice systems do not operate this way because there are weighty public interests in holding criminals responsible and in finality that militate against automatically undoing that which has been done by the courts. There must be an overriding reason to reopen final judgments. A breach of Article 36 by itself is not treated by any State as warranting automatic action. This is because Article 36(1)(b) does not, contrary to Mexico's suggestion, create rights that are fundamental to due process. It protects only a possibility of assistance from consular officers, *not* a right to receive such assistance, nor does it impose standards for the provision of such assistance when it is given. This is not surprising, since all criminal justice systems must be able, like that of the United States, to ensure a foreign national a fair trial regardless of whether consular assistance is provided.

1.21 Mexico's case depends upon another related but insupportable conclusion. Mexico argues that consular assistance is both essential to fundamental due process and has

emerged as a human right. This assumption underlies Mexico's argument that one of the VCCR's purposes is to assure the consular official's direct involvement in the criminal process because, without the consular official, the United States could not be trusted to treat Mexican defendants fairly. Moreover, Mexico asks this Court to assess the design and operation of the procedural rules governing the criminal justice systems in the United States, including those related to the timely presentation of claims, and find them wanting. All of this is notwithstanding the protections afforded by the Constitution and laws of the United States to all persons charged with criminal offenses, and the responsibility of the courts to assure that all Mexican nationals benefit from those protections.

1.22 Mexico's argument, of course, runs squarely in the face of the Court's judgment in *LaGrand*. The Court stated that it had "not found that a United States law, whether substantive or procedural in character [was] inherently inconsistent with the obligations undertaken by the United States in the" VCCR[4]. Mexico argues that the Court was mistaken. It has not, however, provided a factual or legal foundation for that argument. Rather, Mexico presents some references to newspaper stories, isolated instances of comments by local officials, and articles by pamphleteers that have since been discredited by empirical research. Even if it were the Court's practice to review the legal systems of States and award them passing or failing grades, which it is not, the material Mexico has put forward in support of its position would be totally inadequate. The Court should reject Mexico's argument insofar as it depends on the premise that for a Mexican national to receive a fair trial in the United States, the participation of a Mexican consular official is required.

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[4] *LaGrand, Judgment*, para. 125.

1.23 Simply put, Mexico overreaches. The case presented by Mexico is one lacking any factual, legal, or prudential basis upon which relief could or should be granted.

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1.24 This Counter-Memorial will proceed as follows. First, the United States will present a statement of the overall factual context in which the dispute between Mexico and the United States arises. It will then establish that many of Mexico's claims either exceed the Court's jurisdiction or should be found to be inadmissible. Next, the United States will analyze the relevant provisions of the VCCR and will establish that Mexico's arguments on the new legal issues presented are without merit and that, with respect to the issues that this Court has already resolved in *LaGrand*, the United States fully meets its international obligations under the VCCR, as this Court stated those obligations in *LaGrand*. The United States will then establish that the fifty-four specific cases Mexico has featured are far more complex legally and factually than Mexico's pleadings indicate and that Mexico has not met its burden of proof. Finally, the United States will establish why this Court ought not revisit its conclusions in *LaGrand* nor grant Mexico the exceptional remedy it has requested.

CHAPTER II

STATEMENT OF FACTS

2.1 Each of the fifty-four cases before this Court is different[5]. We summarize cases briefly here and discuss them in more detail in Chapter VII of this Counter-Memorial where we analyze them in light of the relevant provisions of the VCCR. To understand these cases properly, however, it is also necessary to be accurately informed about the context in which the cases have arisen. Regrettably, Mexico's Memorial has presented a badly distorted picture of the background to these cases. Unless it is corrected, this would create a highly misleading impression of the United States, its legal system, and its commitment to observe Article 36 of the VCCR.

A. The Facts of the Fifty-Four Cases Are Unique, Complex, and Inconsistent with Mexico's Description of Them

2.2 Each of the fifty-four cases has its own, unique facts that remain under review both by the Department of State and by our legal system, but several patterns are clear. All involve persons originally sentenced to capital punishment for heinous murders. A number involve questions of nationality – the cases include at least one and probably more citizens of the United States, as to whom no obligation attached under Article 36. They also include allegedly Mexican nationals (Mexico has failed properly to establish the nationality of any) who apparently failed to make their Mexican nationality known to

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[5] We will henceforth reference the cases by the case number assigned by Mexico in Appendix A to Annex 7 of the Memorial, followed by the person's family name. The facts of the cases are presented in appendices, sometimes supported by exhibits, to the Declaration of Peter Mason Concerning the Fifty-Four Cases (hereinafter, this declaration will be referred to as the "Cases Declaration"), Annex 2.

the competent United States authorities at the time of their arrest or detention or were affirmatively understood by the authorities to be United States citizens[6].

2.3 Regardless of their nationality, we know that at least forty-five of these defendants had been in the United States for more than five years before their arrest, and that many had lived in the United States since childhood. A number were fluent in English. At least forty were quite familiar with the United States criminal justice systems at the time of their arrest, usually due to prior arrests[7].

2.4 Some of the fifty-four defendants, but not all, made statements to the police. Five did so prior to being arrested or detained, and thus before any obligation under Article 36 could have attached, even under Mexico's interpretation of that article[8]. A sixth gave an incriminating statement to Mexican authorities prior to his arrest by United States authorities[9]. Moreover, not all of the defendants' statements were used at their trials. When they were used, they were used only after a court had the opportunity to consider whether the defendant had understood and knowingly waived his constitutional rights, including his right not to make a statement and to the assistance of counsel.

2.5 In many cases, Mexican consular officers were aware of

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[6] *See* detailed discussion *infra* Chapter VII.B, and in particular n.133.

[7] *See* Appendices to the Cases Declaration, Annex 2.

[8] These are: #29 Zamudio Jimenez; #36 Leal Garcia; #39 Moreno Ramos; #41 Ramírez Cardenas; #51 Perez Gutierrez. *See* Cases Declaration, corresponding Appendices, Annex 2.

[9] *See* Case #22 Salcido Bojorquez. *See also* Cases Declaration, corresponding Appendices, Annex 2.

the arrest prior to trial and sentencing and had an opportunity to provide timely consular assistance[10]. Indeed, notification to consular officers frequently occurred early enough that, if a problem existed, a timely claim under Article 36 could have been raised with the trial court if desired. Yet more often than not, even in this situation, no claim was made. Nor, in many instances, was the claim raised through a period of many years and multiple judicial proceedings. In those cases in which claims were raised, however, courts have considered them on the merits, including cases where the claim was also found to have been raised too late.

2.6 In short, the facts of these cases are extremely varied, and no single generalization can be made about them. But few, if any, are comparable to the *LaGrand* case. More importantly, the remedy set out in *LaGrand* is still available. The great majority of the fifty-four cases are still in the midst of state or federal judicial proceedings. Some will likely remain in litigation for a number of years. In three cases the sentence has been commuted through the clemency process, based in part on a claimed breach of Article 36[11]. And the convictions and sentences of the remaining fifty-one defendants can also be reviewed and reconsidered in the clemency process in light of any breach of Article 36.

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[10] In a number of them, Mexico did not provide the level of consular assistance it describes as its general practice. Compare Memorial, Statement of Facts, Subsection A, paras. 34-88 with, *e.g.*, #6 Covarrubias Sanchez, #34 Hernánez Llanez, #47 Solache Romero; Cases Declaration, corresponding Appendices, Annex 2.

[11] *See* Cases #45 Caballero Hernandez, #46 Flores, and #47 Solache Romero. *See* Cases Declaration, corresponding Appendices, Annex 2.

B. The Fifty-Four Cases Arise in a Large and Diverse Country with Independent Law Enforcement Systems in which Foreign Nationals are Not Always Identified as Such

2.7 The fifty-four cases involve arrests, convictions, and sentences imposed by courts in ten states that, under the United States' federal system of government, enjoy substantial autonomy from the federal government on law enforcement matters[12]. Within broad parameters – chiefly the Constitution of the United States and the individual state constitutions – the federal government and the government of each of the fifty states and other jurisdictions (such as the District of Columbia and Puerto Rico) set for themselves the processes they (and their law enforcement officers) will follow in arrests and bookings, what information will be sought from detainees, how issues are decided before trial, and how trial, conviction and sentencing will be conducted. Direct enforcement responsibility rests with 18,000 separate state and local law enforcement units employing 700,000 officers[13]. They are spread geographically over a huge area – 9.8 million square kilometers[14]. They perform law enforcement functions for over 274 million persons[15].

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[12] The ten states are: Arizona; Arkansas; California; Florida; Illinois; Nevada; Ohio; Oklahoma; Oregon; and Texas.

[13] United States Department of Justice, Office of Justice Programs, *Bureau of Justice Statistics, Law Enforcement Statistics: Summary Findings, 2000, available at* http://www.ojp.usdoj.gov/bjs/lawenf.htm#summary, Annex 23, Exhibit 190.

[14] *See* United States Census Bureau, *Geographic Comparison Table: Population, Housing Units, Area, and Density: 2000, available at* http://factfinder.census.gov/servlet/BasicFactsTable?_lang=en&_vt_name=DEC_2000_SF1_U_GCTPH1_US9&_geo_id=01000US, Annex 23, Exhibit 191.

[15] The total United States population in 2000 (the last general census) was 274 million persons. United States Census Bureau, *The Foreign Born Population in the United States: (Table 1.1) Population by Sex, Age and*

2.8 The United States is often called a nation of immigrants. While 246 million of its citizens (as of 2000) were born in the United States, in almost all cases they descended from immigrants. Another 11 million were born in another country and acquired United States citizenship through naturalization. The laws of the United States concerning citizenship are extraordinarily generous, allowing acquisition of citizenship at birth by virtually all persons born in the United States and by persons born outside the United States to a United States citizen parent in a wide range of circumstances. They also liberally allow acquisition of citizenship through naturalization by aliens who have lived in the United States as lawful permanent residents. In addition, the United States has had significant programs permitting even aliens illegally in the United States to legalize their status and eventually become citizens[16].

2.9 Of course, many persons in the United States are not United States citizens. The United States has 8 million legally resident aliens[17]. Approximately 7 million aliens are illegally present in the United States[18]. Each year approximately 40 million foreign nationals visit the United States[19]. In 2000, an estimated 4.8 million Mexican nationals resided in the United

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Citizenship Status, Current Population Survey, document PPL-135, 2000, Mar., Annex 23, Exhibit 2.

[16] *See* Declaration of Edward Betancourt (hereinafter, this Declaration will be referred to as the "Betancourt Declaration"), paras. 2-8, Annex 18.

[17] United States Immigration and Naturalization Service, Office of Policy and Planning, *Estimates of the Unauthorized Immigrant Population Residing in the United States: 1990 to 2000*, 2003, Jan., p. 18, Annex 23, Exhibit 4.

[18] *Id.* at p. 1.

[19] United States Trade Administration, Office of Travel & Tourism Industries, *International Arrivals to the U.S.: Historical Visitation 1995-2002*, 2003, Apr., p. 6, *available at*, http://www.tinet.ita.doc.gov/view/f-2002-04-001/index.html?ti_cart_cookie=20031024.091422.30935, Annex 23, Exhibit 192.

States illegally (69% of all illegal aliens)[20], and in that same year, over 56,000 Mexican aliens were removed for criminal violations[21].

2.10 As a result, the United States has numerous racial or ethnic minority groups among its residents. The largest single racial or ethnic minority group in the United States (33 million) is Hispanic[22], almost two-thirds of whom are persons of Mexican heritage (21.7 million)[23]. Spanish is the *lingua franca* in many communities. In a country where persons of Hispanic descent serve in Congress, in high-ranking Executive Branch positions, and as Governors, where they sit as federal and state judges, serve as Ambassadors, Generals and Admirals, and as law enforcement officers at all levels, to "look Hispanic", to speak with an accent, or to carry a Hispanic surname does not in any way indicate that a particular individual is not a citizen of the United States.

2.11 The vast majority of persons arrested in the United

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[20] United States Immigration and Naturalization Service, Office of Policy and Planning, *Estimates of the Unauthorized Immigrant Population Residing in the United States: 1990 to 2000*, 2003, Jan., pp. 1, 9, Annex 23, Exhibit 4.

[21] United States Immigration and Naturalization Service, *2000 Statistical Yearbook of the Immigration and Naturalization Service*, 2002, Sept., pp. 234-235, Annex 23, Exhibit 193.

[22] Melissa Therrien & Roberto R. Ramirez, "The Hispanic Population in the United States", in *Current Population Reports* (United States Census Bureau), document P20-535, 2000, Mar., p. 1, Annex 23, Exhibit 3.

[23] Melissa Therrien & Roberto R. Ramirez, "The Hispanic Population in the United States", in *Current Population Reports* (United States Census Bureau), document P20-535, 2000, Mar., p. 1, Annex 23, Exhibit 3. In light of the Mexican expatriate population in the United States, the Government of Mexico operates 56 consulates and honorary consulates, along with other representative offices, in the United States, by far the greatest number of any foreign government. Other States Parties to the VCCR have varying levels of consular representation in the United States, with no necessary correlation between the number of sending State consulates and the number of sending State nationals in the United States.

States are United States citizens for whom consular notification requirements are not an issue. Moreover, given the size of the United States, many law enforcement departments rarely arrest foreign nationals. In these and other jurisdictions, when someone is arrested, United States citizenship may be taken for granted regardless of surname, appearance, or place of birth inside or outside the United States as long as the person arrested has been in the United States for a period of time. When a person is arrested, it is neither easy nor necessarily standard practice to inquire into that person's citizenship. The question of nationality is not at the time of an arrest among the officer's central concerns, which are first to protect the public and investigate the circumstances of the crime, and second to identify the person arrested and determine whether he or she has committed the crime. This latter function, identifying a person for law enforcement purposes, can be done by accessing records maintained on the basis of name and date of birth that do not necessarily include nationality information. Moreover, enforcement of the immigration laws of the United States is primarily the responsibility of the federal government, not the states.

2.12 A United States citizen may not have any documentation of citizenship, and will almost certainly not be carrying such documentation at the time of arrest. Persons born in the United States may live their entire lives without obtaining a citizenship document, such as a passport, because the United States has no national identity card system (nor, even, a law requiring that all persons carry identity documents with them). Persons more commonly carry documents such as a driver's license, which are issued both to citizens and non-citizens and indicate identity and residency rather than citizenship or nationality[24].

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[24] *See* Betancourt Declaration, Annex 18, para. 10; Declaration of Dominick Gentile Concerning Bureau of Citizenship and Immigration Services

2.13 Foreign nationals may also not have with them documents showing their nationality, particularly if they are in the United States illegally. If a foreign national is arrested and claims to have been born in the United States or to be a United States citizen, it would take some time to learn that the claim is false[25]. Determining that a person who has been arrested is a foreign national is also complicated by a number of other factors. Persons may resent being asked about their nationality, taking the inquiry as a questioning of their legitimacy as United States citizens or as being motivated by stereotypes. The millions who are in the United States illegally may not wish to disclose their nationality, out of fear of being handed over to the immigration authorities. Aliens regardless of status may decline to have their consular officers notified, out of distrust of their own government, or a desire not to have it involved in their affairs[26]. Long-term legal aliens may regard their nationality as irrelevant or as a matter of personal privacy[27].

2.14 This congeries of social, cultural, historical, legal and demographic factors helps explain the number of foreign nationals involved in the criminal justice systems of the United States without being recognized (or choosing to identify

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Records (hereinafter, this declaration will be referred to as the "Gentile Declaration"), para. 2, Annex 19.

[25] *See* Betancourt Declaration, paras. 3, 4, 7, 9, Annex 18; Gentile Declaration, para. 2, Annex 19.

[26] In fact, the vast majority of foreign nationals in the United States decline consular notification when given consular information. *See* Declaration of Ambassador Maura A. Harty Regarding United States Compliance with Article 36(1)(b) of the Vienna Convention on Consular Relations (hereinafter, this declaration will be referred to as the "Compliance Declaration"), para. 54, Annex 1.

[27] The Supreme Court has recognized that "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded on the doctrine of equality". *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943), Annex 23, Exhibit 6.

themselves) as such. As a consequence, it is possible that some foreign nationals may not be informed of the possibility of consular notification under the VCCR at the time of their arrest notwithstanding the best efforts of the United States Government. This is not remarkable; the practical difficulties of implementation were expressly recognized during the negotiation of the VCCR,[28] and remain relevant today to the ability of all States Parties, especially in diverse and dispersed societies, to comply. Difficulties in implementation should not

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[28] For example, the United Kingdom delegate to the U.N. Conference on Consular Relations, ". . . recognized the possibility of special problems, as in the case of neighbouring countries where people crossed the border frequently for work or pleasure. . . . Another solution would be to add a sentence to the effect that the obligation applied only where persons were detained for more than 48 hours." United Nations, *Conference on Consular Relations, Vol. I, Summary records of plenary meetings and of the First and Second Committees*, A/CONF.25/16, 1963, p. 340, para. 21, Annex 23, Exhibit 7. Similarly, the representative of the Federation of Malaya stated that "[sub-paragraph (b) of article 36(1) – then requiring notification in all cases] seemed to him to be inapplicable in a country with a high level of immigration, such as his own, where foreign nationals formed almost half the population. If the sub-paragraph was adopted, the Federation of Malaya would be compelled to make reservations, and it would certainly not be alone in doing so." United Nations, *Conference on Consular Relations, Vol. I, Summary records of plenary meetings and the meetings of the First and Second Committees,* document A/CONF.25/16, 1963, p. 36, para. 11, Annex 23, Exhibit 7. Thailand proposed the deletion of sub-paragraph (b) in its entirety, Thailand: amendment to article 36, document A/CONF.25/C.2/L.101, in United Nations, *Conference on Consular Relations, Vol. II, Annexes: Proposals and amendments submitted in the Second Committee*, document A/CONF.25/16/Add.1, 1963, p. 84, Annex 23, Exhibit 8, stating that: "[t]here were over four million aliens in Thailand, and they were free to live in any part of the territory – an area of 500,000 square kilometres – except for the areas which were prohibited on security grounds; some of them resided in very remote districts. Sub-paragraph (b) [then requiring notification in all cases] imposed an obligation which his government would be unable to fulfill, and he would therefore oppose it." United Nations, *Conference on Consular Relations, Vol. I, Summary records of plenary meetings and the meetings of the First and Second Committees,* document A/CONF.25/16, 1963, at pp. 336-337, para. 34.

call into question how diligently the United States has been working to meet its obligations under the VCCR.

C. All of the Fifty-Four Persons Have Been Tried in a Legal System that Guarantees Due Process to All Defendants Regardless of Nationality

2.15 Each of the fifty-four cases involves a person, whether a citizen of the United States or of Mexico, who was and is entitled to the full due process guarantees provided by the United States federal and state criminal justice systems. These guarantees, including procedural guarantees, meet and even exceed the requirements of international law[29]. As will be evident from the description below, these guarantees address themselves to many of the same kinds of issues that a consular officer might normally address were one of his nationals arrested: representation by legal counsel; adequate language interpretation; an objective understanding of the proceedings; and the like. The United States and its constituent units are obligated to honor due process rights, regardless of the nationality of the defendant, and regardless of the legality or illegality of a foreign national's presence in the United States[30].

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[29] *See* Declaration of Christopher A. Wray, Assistant Attorney General, Criminal Division, U.S. Department of Justice (hereinafter, this declaration will be referred to as the "Criminal Justice Declaration"), paras. 14-15, Annex 7; compare with Articles 9, 14, and 15 of the International Covenant on Civil and Political Rights, 19 Dec. 1966, 999 U.N.T.S. 171, 175-177, Annex 23, Exhibit 194.

[30] *See, e.g., Zadvydas v. Davis*, 533 U.S. 678, 693 (2001), Annex 23, Exhibit 9 ("But once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.") (citing *Plyler v. Doe*, 457 U.S. 202, 210 (1982), Annex 23, Exhibit 10; *Mathews v. Diaz*, 426 U.S. 67, 77 (1976), Annex 23, Exhibit 11; *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596-598, and nn. 5, 6 (1953), Annex 23, Exhibit 12; and *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886), Annex 23, Exhibit 13).

Where these rights are breached, the conviction or sentence can often be set aside.

2.16 Police officers in the United States frequently question potential witnesses during a criminal investigation without arresting or detaining them. There is no requirement that such witnesses give their information in the presence of legal counsel or subject to other conditions if it is given freely. As noted above, five of the fifty-four defendants gave statements in such circumstances[31]. In each case in which there was a custodial interrogation, however, (*i.e.*, the person was not free simply to walk away), the person was protected by a requirement that he must be informed, in a language that he could understand, that he had the right to remain silent (that is, the right not to incriminate himself), a right enshrined in the United States Constitution[32]. The Fifth Amendment provides, in relevant part: "no person ... shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law". Each arrested person must be told the consequences of giving up that right and answering questions ("anything you say can and will be used against you in a court of law"), that he or she has the right to speak with a lawyer before answering any questions, and that, if he or she cannot afford to hire a lawyer, one will be provided at government expense[33].

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[31] As noted above, these are Cases #29 Zamudio Jimenez, #36 Leal Garcia, #39 Moreno Ramos, #41 Ramírez Cardenas, #51 Perez Gutierrez.

[32] *See* Criminal Justice Declaration, paras. 8, 20-26, Annex 7; United States Constitution, Amendments 5 and 14, Annex 23, Exhibit 14. This guarantee is made applicable to the states by the Fourteenth Amendment. The colloquial expression "to take the Fifth" means to invoke the rights guaranteed by the Fifth and Fourteenth Amendments as the basis for refusing to testify in a criminal court or to make incriminating statements to government authorities.

[33] *See Miranda v. Arizona*, 384 U.S. 436, 478-479 (1966), Annex 23, Exhibit 15.

2.17 These are what have come to be known as "*Miranda* warnings" or statements of "*Miranda* rights" – constitutional rights that the United States Supreme Court has said are so fundamental that any person in custody must be informed of them before a statement is taken. If a statement of an incriminating character was made to a law enforcement official in any of the fifty-four cases while the person was in detention, it could be introduced into evidence by the prosecutor at trial over the person's objection if the judge determined that it was made in the presence of legal counsel, or that the person knowingly and intelligently waived the right to remain silent. Courts have held repeatedly that language difficulties can render a waiver invalid[34].

2.18 Further, none of the fifty-four could be kept in prolonged detention unless charged with a crime and, once charged, each was entitled to be informed promptly and in detail of those charges, and to a prompt determination that there was probable cause to believe he committed the crime for which he

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[34] *See, e.g., United States v. Garibay*, 143 F.3d 534, 537 (9th Cir. 1998), Annex 23, Exhibit 16 ("In determining whether a defendant knowingly and intelligently waived his *Miranda* rights, we consider, as one factor, any language difficulties encountered by the defendant during custodial interrogation."); *United States v. Heredia-Fernandez*, 756 F.2d 1412, 1415 (9th Cir. 1985), Annex 23, Exhibit 17 ("One precondition for a voluntary custodial confession is a voluntary waiver of Miranda rights, and language difficulties may impair the ability of a person in custody to waive these rights in a free and aware manner."); *United States v. Short*, 790 F.2d 464, 469 (6th Cir. 1986), Annex 23, Exhibit 18 (where defendant's native language was German and she had deficient usage and understanding of English, without the assistance of a translator her waiver of Miranda warnings was deemed not to be knowingly and voluntarily given). *See generally North Carolina v. Butler*, 441 U.S. 369, 374-375 (1979), Annex 23, Exhibit 19 (waiver of constitutional rights is determined by the particular facts and circumstances, "including the background, experiences, and conduct of the accused" (quotation omitted)).

was arrested[35]. Thereafter, each of the fifty-four was brought promptly before a judge, who was responsible for explaining the detainee's rights and the legal process, and for arranging for legal counsel if a lawyer had not already been appointed[36]. These appearances before a judge generally occur within twenty-four to forty-eight hours of arrest and, in some jurisdictions in the United States, are the point at which competent authorities have decided to provide foreign nationals with Article 36 consular information[37].

2.19 Once charged, all of the fifty-four defendants were entitled to have adequate time and opportunity to prepare a defense and to consult with counsel[38]. Throughout this process, they were protected against discrimination based on race, gender, ethnicity or national origin[39].

2.20 The United States federal and state criminal justice systems aggressively preserve and vindicate these rights, and have done so – or are in the midst of doing so – in each of the fifty-four cases. The courts have addressed or will address,

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[35] *See* Criminal Justice Declaration, para. 15, Annex 7; *Bousley v. United States*, 523 U.S. 614, 618 (1998), Annex 23, Exhibit 20; *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975), Annex 23, Exhibit 21; *County of Riverside v. McLaughlin*, 500 U.S. 44, 53 (1991), Annex 23, Exhibit 22.

[36] *Gideon v. Wainright*, 372 U.S. 335, 344-345 (1963), Annex 23, Exhibit 23; *Scott v. Illinois*, 440 U.S. 367, 373-374 (1979), Annex 23, Exhibit 24; *see also* Criminal Justice Declaration, para. 15, Annex 7.

[37] *See* Compliance Declaration, para. 44, Annex 1 and Appendix 3, Annex 1; Cases Declaration, Appendix 10, Annex 2 (Juarez Suarez informed at arraignment).

[38] *See, e.g., United States v. Wooten*, 688 F.2d 941, 949-950 (4th Cir. 1982), Annex 23, Exhibit 25 (federal law, reflecting constitutional due process requirement, provides that trial not commence sooner than 30 days from the date the defendant first appears with counsel).

[39] *See* United States Constitution, Amendments 5 and 14, Annex 23, Exhibit 14; *see also Craig v. Boren*, 429 U.S. 190, 210 (1976), Annex 23, Exhibit 26; *Loving v. Virginia*, 388 U.S. 1, 11-12 (1967), Annex 23, Exhibit 27; *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954), Annex 23, Exhibit 28.

directly at trial or through appellate or collateral (*habeas corpus*)[40] review, the very issues that Mexico raises most urgently in its Memorial: the adequacy of counsel (whether privately hired or provided at government expense)[41]; the voluntariness of confessions or other incriminating statements[42]; and the objective understanding by the defendant of his or her rights[43]. In the United States, the federal government and each state statutorily guarantees that every person convicted of a crime may appeal that conviction on any legal or factual basis. In capital cases, some states make such appeals mandatory

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[40] *See Bounds v. Smith*, 430 U.S. 817, 821-822 (1977), Annex 23, Exhibit 29.

[41] *See* Criminal Justice Declaration, paras. 15, 59, Annex 7; *Wiggins v. Smith*, 156 L. Ed. 2d 471, 472, 493-495, Annex 23, Exhibit 30 (failure to present mitigation evidence at capital sentencing proceeding constituted ineffective assistance, required that sentence be vacated); *Ramirez v. State*, 65 S.W.3d 156, 160 (Tex. App. 2001), Annex 23, Exhibit 31 (reversing conviction of Mexican national due to ineffective assistance of counsel); *Morales v. State*, 910 S.W.2d 642, 646 (Tex. App. 1995), Annex 23, Exhibit 32 (same). *See* Mexico Memorial, paras. 72-78.

[42] *See, e.g., Escobedo v. Illinois*, 378 U.S. 478, 490-491 (1964), Annex 23, Exhibit 33 (overturning murder conviction and excluding from evidence incriminating statement by defendant of Mexican extraction where request for counsel was ignored); *People v. Montano*, 277 Cal. Rptr. 327, 336-337 (Cal. Ct. App. 1991), Annex 23, Exhibit 34 (overturning murder conviction of Mexican national due to police violation of defendant's right to remain silent). *See* Mexico Memorial, paras. 56-60.

[43] *See, e.g., Reyes-Perez v. State,* 45 S.W.3d 312, 319-320 (Tex. App. 2001), Annex 23, Exhibit 35 (reversing conviction of Mexican national due to lack of knowing waiver of rights due to language barrier); *Baltierra v. State,* 586 S.W.2d 553, 559 (Tex. Crim. App. 1979) (*en banc*), Annex 23, Exhibit 36 (overturning conviction of Mexican national on grounds that waiver of rights was not knowing and intelligent); *People v. Marquez*, 756 N.E.2d 345, 350, 359 (Ill. App. Ct. 2001), Annex 23, Exhibit 37 (allowing post-conviction assertion of involuntary waiver of rights of Mexican national due to language difficulties); *State v. Ramirez*, 732 N.E.2d 1065, 1069-1070 (Ohio Ct. App. 1999), *stay granted*, 724 N.E.2d 814 (2000), *cause dismissed*, 725 N.E.2d 1154 (2000), Annex 23, Exhibit 38 (reversing conviction of Mexican national due to inadequate understanding of rights). *See* Mexico Memorial, paras. 56-60.

irrespective of the wishes of the defendant[44], and all appeals typically go to the state's highest court. Such reviews serve to safeguard against the possibility of error, mistake, arbitrariness or discrimination[45].

2.21 Judges are sensitive to the special challenges faced by non-English speaking foreign nationals in United States criminal justice systems, including Mexican nationals whose first language is one other than English. Courts have repeatedly held that defendants who do not speak English are entitled to the assistance of an interpreter[46], and go to extraordinary

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[44] *See* Criminal Justice Declaration, paras. 28, 63, Annex 7; *see also* Vikramaditya S. Khanna, "Double Jeopardy's Asymmetric Appeal Rights: What Purpose Do They Serve?", in *Boston University Law Review*, Vol. 82, No. 2, 2002, Apr., p. 345, Annex 23, Exhibit 39 ("The general rule is that the government may not appeal an initial trial acquittal save for a few limited exceptions. The defense, however, may appeal convictions.")

[45] *See, e.g., Gregg v. Georgia*, 428 U.S. 153, 188-195, 204-206 (1976) (plurality opinion of Stewart, Powell, and Stevens, JJ), Annex 23, Exhibit 55.

[46] *See, e.g., United States ex rel. Negron v. State of New York*, 434 F.2d 386, 390 (2d Cir. 1970), Annex 23, Exhibit 40 (criticizing inadequacy of interpretation for Spanish-speaking defendant as "[p]articularly inappropriate in this nation where many languages are spoken ... [indicating state] callousness to the crippling language handicap of a newcomer to its shores, whose life and freedom the state by its criminal processes chooses to put in jeopardy".); *United States v. Lim*, 794 F.2d 469, 470-471 (9th Cir. 1986) (*per curiam*), Annex 23, Exhibit 41 (affirming Korean national criminal defendant's right to a court-appointed interpreter when his comprehension of the proceedings or ability to communicate with counsel is impaired); *Application of Murga*, 631 P.2d 735, 737 (Okla. 1981), Annex 23, Exhibit 42 (affirming use of court funds to hire interpreters for indigent Mexican national defendants); *People v. Mata Aguilar*, 677 P.2d 1198, 1201-1203 (Cal. 1984), Annex 23, Exhibit 43 (same for Spanish-speaking Mexican-American); *cf. Calderon-Palomino v. Nichols*, 36 P.3d 767, 770 (Ariz. Ct. App. 2001), Annex 23, Exhibit 44 (affirming state funding for translation of reasonably necessary documents in support of defense of Mexican national in murder case). *See* Mexico Memorial, paras. 39, 49, 54.

lengths to address this issue[47]. Defendants also receive the assistance of investigators and experts – the kinds of persons who can help develop exculpatory and mitigation evidence, regardless of the availability of consular assistance – where the need for such assistance can be demonstrated[48]. In addition to excluding from evidence incriminating statements that followed involuntary or uninformed waivers of rights[49], courts have waived procedural default rules to consider claims where fundamental fairness required it[50], and have overturned convictions where the rights of defendants have otherwise been violated[51].

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[47] An example is offered by the case of Matilde Perez-Merino, case #100, discussed in Appendix 4 to the Compliance Declaration, Annex 1. The defendant spoke a dialect that required bringing an interpreter first from California and then from Mexico.

[48] Mexico is simply wrong in saying that consular assistance is essential to ensure that exculpatory and mitigating evidence is developed. *Compare* Mexico Memorial, paras. 81-88 *with, e.g., Williams v. Martin*, 618 F.2d 1021, 1026-1027 (4th Cir. 1980), Annex 23, Exhibit 45 (affirming the obligation of the government to provide an expert witness on Equal Protection grounds); *People v. Watson*, 221 N.E.2d 645, 648-649 (Ill. 1966), Annex 23, Exhibit 46 (holding that defendant was entitled to have the state pay for a handwriting expert because it was necessary to ensure a fair trial); *see also* 18 U.S.C. § 3006A(e)(1), Annex 23, Exhibit 47.

[49] *People v. Montano*, 227 Cal. Rptr. 327 (Cal. Ct. App. 1991), Annex 23, Exhibit 34 (reversing conviction of illegal Mexican immigrant and excluding confession obtained through coercive police questioning); *cf. United States v. Cruz*, 581 F.2d 535, 542-543 (5th Cir. 1978) (*en banc*), Annex 23, Exhibit 48 (excluding incriminating statements by illegal Mexican aliens obtained as a result of an unconstitutional police stop and search).

[50] *See, e.g., People v. Marquez*, 756 N.E.2d 345, 349-350 (Ill. App. Ct. 2001), Annex 23, Exhibit 37 (permitting Mexican national to challenge voluntariness of waiver of rights out of concern for "fundamental fairness" notwithstanding default of claims).

[51] *See, e.g., United States v. Navarro Viayra*, 206 F. Supp. 2d 1057, 1066, 1068 (E.D. Cal. 2002), Annex 23, Exhibit 49 (*sua sponte* ordering new trial of illegal Mexican immigrants where evidence did not support jury verdict of guilt).

2.22 The United States has established additional guarantees in capital cases, including providing multiple lawyers with experience in capital cases in some states and in the federal system, making available a greater number of peremptory challenges of potential jurors during jury selection, and making greater provision for expert and investigative assistance[52]. At the sentencing phase of the trial, capital defendants are constitutionally permitted to introduce mitigating evidence – often without regard to the strict evidentiary rules that apply to determinations of guilt and innocence – that is relevant to the circumstances of the offense or to the defendant's own background and character, and jurors are entitled to consider that mitigating circumstance as a reason for imposing a sentence other than death[53]. Juries that are asked to recommend sentencing in cases where a capital sentence is possible are given special instructions about the alternative of life imprisonment without possibility of parole where relevant[54]. All of the defendants in the fifty-four cases have benefited from these additional guarantees, as well as the opportunities for judicial review described above[55].

2.23 The criminal justice systems of all countries, however, operate under various rules that seek to ensure that criminal cases will be resolved not just fairly but also promptly and

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[52] *See* Criminal Justice Declaration, para. 63, Annex 7.

[53] *See, e.g., Eddings v. Oklahoma,* 455 U.S. 104, 110 (1982), Annex 23, Exhibit 50; *Lockett v. Ohio,* 438 U.S. 586, 604 (1978) (plurality opinion), Annex 23, Exhibit 51; *McCoy v. North Carolina,* 494 U.S. 433, 443-444 (1990), Annex 23, Exhibit 52; *Mills v. Maryland,* 486 U.S. 367, 384 (1988), Annex 23, Exhibit 53; Criminal Justice Declaration, paras. 61-62, Annex 7.

[54] *See Simmons v. South Carolina*, 512 U.S. 154, 169 (1994) (plurality opinion of Blackmun, J.); 512 U.S. at 177 (concurring opinion of O'Connor, J., Rehnquist, C.J., and Kennedy, J.), Annex 23, Exhibit 54.

[55] *See* Criminal Justice Declaration, para. 63, Annex 7. In those few states not providing for automatic review, the defendant uniformly has the option to appeal the conviction and sentence.

definitely[56]. The United States is no different. In furtherance of the important public interest in the orderly administration of justice, the legislatures and the courts have crafted procedural rules designed to encourage both prosecutors and defendants to resolve all factual issues at trial, and to raise all relevant legal issues at the earliest appropriate stage in the proceedings, so that they can be resolved in dispositive ways. Were defendants instead allowed to delay raising determinative issues until appellate or collateral review, a reversal and requirement of new trials on account of errors that could have been corrected or resolved before or at trial necessarily would cause needless waste of law enforcement and judicial resources. Moreover, the administration of justice would be compromised as witnesses' memories faded or critical evidence deteriorated or was lost, and courts would be overwhelmed by the need to conduct multiple trials of the same case. In addition, defendants would be given extraordinary and unchecked power to slow down the process. The legal consequence of failing to observe the requirement to raise a claim at the first opportunity, without a cognizable excuse, is therefore that many – but not all – claims not raised in a timely way are deemed defaulted and are precluded from further consideration in the later stages of the case[57].

2.24 The preclusion rules are tempered in the United States, however, in several different ways. First, even a defaulted

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[56] Rules common to most legal systems concerning the treatment of procedural errors on appeal and the effect of procedural errors on the finality of judgments are explained in the Declaration of Professor Thomas Weigend Concerning the Compatibility of Mexico's Submissions with Rules of Criminal Procedure Followed by National and International Criminal Courts (hereinafter, this declaration will be referred to as the "Weigend Declaration"), paras. 22-36, Annex 3; *see also* Criminal Justice Declaration, at paras. 43-48, Annex 7.

[57] *See* Criminal Justice Declaration, paras. 43-48, Annex 7; Weigend Declaration, para. 25, Annex 3.

claim may be subsequently revived upon a showing of good cause for the failure to raise the issue earlier – such as newly discovered evidence or ineffective assistance of counsel – and of serious prejudice to the defendant's cause[58]. Second, the Supreme Court has expressly held that the failure to raise an ineffective assistance of counsel claim on direct appeal does not bar consideration of such a claim at an appropriate post-appeal proceeding[59]. The failure of counsel to raise an alleged breach of Article 36 may form the basis for a judicial finding of ineffective assistance of counsel and, if the shortcoming caused serious prejudice to the defendant, may provide a basis for relief. For example, in *Valdez v. Oklahoma*[60], the Oklahoma court vacated the death penalty and ordered a new sentencing procedure because Valdez's trial counsel failed to uncover significant evidence that was subsequently discovered through the intervention and assistance of the Mexican consulate. The court found that, although Valdez was not entitled to relief on the procedurally-defaulted VCCR claim, his attorney's failure to enlist the assistance of the Mexican government in assembling mitigation evidence caused substantial prejudice that required resentencing.

2.25 These judicial rights and procedures are supplemented in the United States by executive clemency processes. The Supreme Court has recognized that clemency is an important component of the systems in those states that provide for capital punishment[61]. The clemency process is described more fully in Chapter VI.D, where we explain how the United States is

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[58] *See* Criminal Justice Declaration, paras. 48, 58, Annex 7; *United States v. Frady*, 456 U.S. 152, 167-168 (1982), Annex 23, Exhibit 56.

[59] *See* Criminal Justice Declaration, para. 59, Annex 7; *Massaro v. United States*, 155 L. Ed. 2d 714, (2003), Annex 23, Exhibit 57.

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

[61] *See Herrera v. Collins*, 506 U.S. 390, 414-415 (1993), Annex 23, Exhibit 59.

complying with the principles underlying this Court's decision in *LaGrand*, and why it is entirely appropriate for the United States in cases in which breaches of Article 36 of the VCCR have occurred to provide "review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth"[62] in the VCCR through the clemency process.

2.26 In those cases where, by operation of the rules, courts are unable to correct what appear to be errors or mistakes, the clemency power provides an ultimate haven, unbounded by legal or procedural technicalities and amenable to appeals to conscience, morals, equity, and fairness and to petitions against error, mistake, artifice or prejudice. Clemency is available in each of the ten states in which the fifty-four persons whose cases Mexico has brought to this Court have been convicted[63].

D. The United States Has Consistently Made Good Faith Efforts to Implement the VCCR

2.27 Since becoming party to the VCCR in 1969, the United States has continuously sought to ensure that its arresting and detaining officials comply with the obligations of Article 36. Moreover, the United States has significantly intensified its efforts to comply with its obligations since it became particularly aware in the mid-1990s of cases of foreign nationals receiving capital sentences who were not properly informed that they could request consular notification, and in light of this Court's decision in *LaGrand*[64]. These efforts have been commended as "setting the standard" for other countries[65] and

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[62] *LaGrand, Judgment*, para. 128(7).
[63] *See* Clemency Declarations (States of Arizona, Arkansas, California, Florida, Illinois, Nevada, Ohio, Oklahoma, Oregon, Texas), Annexes 8-17.
[64] *See LaGrand, Judgment*, paras. 124, 128(6).
[65] Compliance Declaration, para. 47, Annex 1.

have improved observance of Article 36 procedures to the extent that Mexican consular officers have even expressed concern that they will be overwhelmed with notifications[66].

2.28 Initially, compliance with consular notification obligations was not a significant issue in the bilateral relationship between the United States and Mexico. Beginning around 1974, however, the United States became concerned about a large number of United States citizens arrested in Mexico and the manner in which they had been tried, the conditions under which they were imprisoned, and the ability of United States consular officers to provide them with consular assistance. In many cases, consular notification requirements had not been observed and consular access had been denied or delayed. As the United States pushed Mexico to improve its consular notification practice, Mexico countered by pushing the United States to do the same. As a result, the Department of State between roughly 1976 and 1981 undertook a special effort to educate law enforcement officials at all levels[67].

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[66] Compliance Declaration, paras. 47-48, Annex 1.

[67] *See* Compliance Declaration, at paras. 8-10, Annex 1. As explained there, Mexico for its part undertook to notify our consular officers of arrests, but noted that it could not ensure compliance in all cases. *See* Letter from Henry A. Kissinger, Secretary of State of the United States of America, to Alfonso Garcia Robles, Foreign Minister of the Mexico, 16 Feb. 1976 (regarding conditions for Americans in Mexican prisons), and the letter sent in response by Alfonso Garcia Robles, Foreign Minister of the Mexico, to Henry A. Kissinger, Secretary of State of the United States of America, 25 Mar. 1976, Annex 23, Exhibit 121. The Garcia Robles letter noted that, "With respect to aliens, agents of the Office of the Attorney General have categorical instructions to inform the consul concerned of any arrest as soon as it is made. . . . We cannot, however, expect that irregularities will not occasionally be committed, especially when arrests occur in remote parts of the country. In such cases the competent authorities will take all necessary measures to correct the irregularities." *Id.*

In the same letter, Mexico also suggested negotiation of a prisoner transfer agreement, under which citizens of one country sentenced in the

2.29 In the 1980s, the number of cases of possible non-compliance brought to the attention of the United States was not large, particularly given the number of foreign nationals and foreign consular offices in the United States. Throughout this period the United States maintained a consistent practice of addressing such cases in the customary way – investigation, apology via a diplomatic note when appropriate, and undertakings to try to correct identified shortcomings and to minimize any likelihood of repetition. Mexico was aware of capital cases that involved potential breaches of Article 36, but did not bring them to the attention of the State Department. Nor did it advise the United States of any significant concern regarding United States compliance in this period. Had it done so, the United States could have taken steps to address them, just as it had done previously[68].

2.30 It therefore was not until 1992 and 1993 that the United States began learning of foreign nationals facing capital punishment who had not been given consular information as required by Article 36[69]. In 1996 and 1997, the United States learned of specific Mexican nationals whose executions were imminent. In recognition of the importance of the VCCR and the seriousness of capital sentences, the United States not only investigated the capital cases brought to its attention and apologized, when appropriate, but it also undertook in its

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other could, with the consent of all parties, be transferred to serve their sentence in the home country. *Id.* Throughout the subsequent negotiations, there was no suggestion that any sentence would be revisited because of a failure to comply with consular notification requirements. The prisoner transfer treaty was concluded in Nov. 1976. Treaty on the Execution of Penal Sentences, 25 Nov. 1976, United States of America-United Mexican States, 28 U.S.T. 7399 (hereinafter, this treaty will be referred to as "Treaty on the Execution of Penal Sentences"), Annex 23, Exhibit 72.

[68] Compliance Declaration, paras. 12-13, Annex 1.

[69] Compliance Declaration, paras. 14-15, Annex 1.

discretion to ask state clemency authorities to consider the fact that the VCCR had been breached, and any representations from the foreign government concerned, in the context of the clemency process as one possibly relevant factor in considering the appropriate outcome of a particular case[70].

2.31 In addition, the United States intensified its efforts to promote compliance with Article 36, including in 1996 by specifically asking the states to notify Mexico of all cases in which Mexican nationals were detained and might face capital punishment[71]. In 1997, it began planning a major new outreach program[72]. That program was officially launched at the beginning of 1998 when the Secretary of State broadly disseminated to federal and state authorities a new, 72-page manual 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*[73] and a pocket-size reference card, designed to be carried by individual

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[70] *See* Compliance Declaration, para. 18, Annex 1 and Annex 1, Appendix 5. As explained there, Mexico's description of the United States response to some twenty capital cases brought to the Department of State's attention by Mexico is inaccurate and misleading. The Compliance Declaration also explains that Mexico is wrong in suggesting, Mexico Memorial, paras. 275-279, that, because clemency was denied, the Department of State's requests in such cases were ignored.

[71] Compliance Declaration, paras. 16-17, Annex 1.

[72] Compliance Declaration, para. 19, Annex 1.

[73] United States Department of State, Office of the Legal Adviser, document 10518, 1998, Jan. (hereinafter, this document will be referred to as the "State Department Manual"), Annex 21. The Manual contains basic instructions for complying with consular notification requirements. It includes a suggested statement to be given to a foreign national from a country governed by the VCCR, which is translated into thirteen languages, including Spanish. The Manual also includes a suggested fax sheet for providing notification when required. *See Id.* at pp. 3-4, 7, 9, and 25-39, Annex 21.

arresting officers, regarding consular notification obligations[74]. Over 100,000 copies of the manual and roughly 600,000 pocket cards are now in circulation[75]. In addition, the Department of State has created other significant training tools, including a video (produced in cooperation with consular officers from Mexico as well as Australia and Canada) designed to convey to law enforcement audiences the importance of consular notification, and a poster with multiple translations of the Department's suggested statement to foreign nationals about the option of consular notification. The Department also maintains an active internet web page with consular notification information and conducts extensive consular notification training and outreach programs around the United States – some in cooperation with Mexican consular officials[76].

2.32 The Department works with foreign consular officers on these issues, and has worked particularly closely with Mexico, helping the Mexican Embassy to design a card that Mexico now distributes to Mexicans in the United States, and conducting numerous programs along the United States-Mexican border designed to improve compliance. These programs demonstrate the commitment of the United States to carrying out its obligations under the VCCR, and its particular commitment to facilitating efforts of the Mexican Government to provide assistance to its nationals in the United States[77].

2.33 The efforts of the United States have had an impact. Throughout the United States, state and local governments have responded by undertaking efforts to improve their compliance with consular notification requirements. Consistent with the federal structure of the United States, and the enormous

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[74] Compliance Declaration, para. 20, Annex 1.
[75] *Id.* at para. 23.
[76] *Id.* at paras. 21-41 and Appendices 1 and 2.
[77] *Id.* at paras. 33-36, 39-41.

diversity among its states and, within the states, its law enforcement jurisdictions, these efforts are resulting in a variety of implementation methods. A few jurisdictions have incorporated consular information into their statements of *Miranda* rights, as Mexico would like, but most have not. Some states have incorporated consular notification procedures into their booking procedures, as the Department of State has recommended. Others have decided that they can more reliably comply by standardizing procedures at the point of arraignment[78]. All of these measures are fully consistent with the requirements of Article 36, and all are resulting in improved observance of Article 36(1)(b)[79].

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[78] *Id.* at paras. 42-51 and Appendix 3.

[79] *Id.* at paras. 46-51. In this regard, Mexico's allegations of systematic continued violations of Article 36, Mexico Memorial, paras. 159-168, are unfounded. The relatively small and statistically insignificant number of specific examples cited by Mexico in support of this allegation involve many cases in which the detained individual was provided consular information as required but declined to have his consular officers notified, as well as cases of persons identified as United States citizens. *See* Compliance Declaration, paras. 52-55, Annex 1 and Appendix 4, Annex 1.

CHAPTER III

THE COURT LACKS JURISDICTION TO DECIDE MANY OF MEXICO'S CLAIMS

3.1 This Court's jurisdiction to hear and decide cases depends on the extent to which each sovereign State has given its consent to decide a genuine and defined legal dispute[80]. The Court's jurisdiction in this case derives from Article 36, paragraph 1 of the Court's Statute, and Article I of the Optional Protocol to the VCCR, in which the United States and Mexico have agreed that this Court shall decide "[d]isputes arising out of the interpretation or application" of that treaty that may arise between them[81]. As described below, however, Mexico's submissions ask the Court to decide questions that do not arise out of the interpretation or application of the VCCR and that the United States has never agreed to submit to this Court[82]. The Court has no jurisdiction to address such questions, and the United States objects to those portions of Mexico's claims.

3.2 While Mexico's Memorial states Mexico's claims in terms of United States obligations under the VCCR, it is apparent that the Memorial is more fundamentally addressed to the treatment of Mexican nationals in the federal and state

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[80] *See Border and Transborder Armed Actions, (Nicaragua v. Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988,* pp. 75-76, para. 16; Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice, Vol. 2,* pp. 436-437 (1986), Annex 23, Exhibit 60.

[81] Optional Protocol, VCCR, Annex 23, Exhibit 1.

[82] It also goes without saying that the Court should not decide issues that fall beyond the four corners of the final submission of Mexico. *See, e.g., Request for Interpretation of the Judgment of 20 November, 1950 in the Asylum Case, Judgment, I.C.J. Reports 1950,* p. 402 ("it is the duty of the Court not only to reply to the questions as stated in the final submissions of the parties, but also to abstain from deciding points not included in those submissions").

criminal justice systems of the United States and, more broadly, to the operation of the United States criminal justice systems as a whole. Thus, on the basis of an asserted connection to the obligations of the United States under the VCCR, Mexico seeks to have this Court decide such fundamental questions as the timing of interrogations of suspects in the United States under federal, state and local law enforcement procedures, the admissibility of evidence in United States criminal cases, and the rules to govern the vacating of convictions and sentences in the United States by federal and state courts. Mexico's invitation to the Court to make far-reaching and unsustainable findings concerning the United States criminal justice systems, and to impose requirements that have no support in the VCCR should be rejected, as it would be an abuse of the Court's jurisdiction.

3.3 In addition, the Court has no jurisdiction under the Optional Protocol to give any effect to the first submission of Mexico, which should therefore be rejected. That submission requests the Court to declare 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 . . . as provided by Article 36 of the Vienna Convention"[83]. The overreaching character of this assertion is best understood if the acts Mexico alleges are wrongful are considered separately.

3.4 First, Mexico asserts that the United States breached Article 36 by "arresting" the fifty-four alleged Mexican nationals. Article 36 of the VCCR, however, creates no obligations constraining the rights of the United States to arrest a foreign national. The obligations created by Article 36 arise only after a foreign national has been arrested or otherwise

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[83] Mexico Memorial, para. 407 (emphasis added).

detained. Any dispute concerning the arrest of a Mexican national, therefore, is manifestly outside the jurisdiction of the Court.

3.5 The same conclusion is appropriate with respect to Mexico's assertion that the United States in "detaining" these Mexican nationals has breached Article 36. Detention of a foreign national may be a predicate for the application of Article 36, but Article 36 itself does not create any obligation with respect to the conduct of a State Party "in detaining" a foreign national. The "detaining" of Mexican nationals, accordingly, is not before the Court. The Court may properly consider an assertion by Mexico that the United States did not properly provide consular information to Mexican nationals in detention, but the Court may not consider an assertion that their detention itself was wrongful.

3.6 Similarly, the remainder of the actions complained of in Mexico's first submission, the "trying, convicting and sentencing" of fifty-four alleged Mexican nationals for the crimes for which they were convicted, are not within the jurisdiction of the Court. The "trying, convicting and sentencing" of Mexico's nationals were steps undertaken by the United States through its state criminal justice systems, which steps are not before the Court. If the United States breached its obligations under Article 36 of the VCCR, such breach may have taken place during the period that the Mexican nationals were subject to the various states' criminal justice systems, but the "trying, convicting and sentencing" of foreign nationals cannot themselves constitute breaches of the VCCR. Mexico's claims should be limited to specific assertions of conduct inconsistent with United States obligations under the VCCR, and the Court should not engage, at Mexico's invitation, in a generalized review of the operation of the United States criminal justice systems, including allegations regarding its innate fairness or its consistency with basic principles of due

process.

3.7 Mexico's fourth submission seeking declarations likewise falls outside the Court's mandate to the extent that it fails to raise a disputed interpretation or application of the VCCR. It goes without saying that the United States is responsible under international law for its actions and those of its constituent parts, including its courts and its states, to the extent of any breaches of the international obligations of the United States. This is not a point the United States has contested.

3.8 Mexico's submissions in respect of remedies also substantially overreach the Court's jurisdiction. It falls to the Court to interpret the VCCR and to state what remedy is required, as a matter of international law, in a particular case. It then falls to the parties to implement the Court's decision in the context of their own municipal legal systems[84]. But Mexico's first and second submissions would have the Court go far beyond its appropriate role of determining the requirements of the VCCR and into a drafting and policymaking role with respect to the municipal legal systems of the United States.

3.9 Mexico's first submission seeking remedies would have the Court require the United States to take specific acts in its municipal criminal justice systems with respect to the cases of fifty-four alleged Mexican nationals and other unnamed Mexican nationals[85]. This would intrude deeply into the independence of those courts by intervening in on-going litigation or by reopening settled cases[86]. It would also have

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[84] *See Haya de la Torre, Judgment, I.C.J. Reports 1951*, pp. 78-79; *Northern Cameroons, Preliminary Objections, Judgment, I.C.J. Reports 1963*, p. 37.

[85] *See* Mexico Memorial, para. 407.

[86] This Court has always been respectful of the independence of judges on the municipal bench. *Cf. Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights,*

this Court declare that the United States is under a specific obligation to vacate the convictions and sentences of the fifty-four named persons. But the Court has no jurisdiction under the Optional Protocol to review the appropriateness of the sentence of any of the fifty-four individuals named in Mexico's Memorial and even less to determine the guilt or innocence of any of them. Questions of that character are of no relevance whatsoever in this case, and only a court of criminal appeal could appropriately go into them. This Court should once again reject the invitation to become a court of criminal appeal, rendering determinations of guilt and penalty[87].

3.10 Mexico's second submission seeking remedies would have the Court declare that the United States is under an obligation to take "all legislative, executive, and judicial steps necessary" to ensure a sweeping range of undertakings in its municipal criminal justice system[88]. Much of Mexico's second submission in respect of remedies would ask this Court effectively to rewrite substantive and procedural municipal criminal law and rules of appellate and collateral procedure in the United States. In the United States, these policy choices are determined by the legislatures of the fifty states, which have jurisdiction over the majority of the criminal law in the United States, by the courts, and occasionally by the United States Congress through, for example, the legislation of federal criminal law or the initiation of the constitutional amendment process. Mexico, however, should not request this Court to

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Advisory Opinion, I.C.J. Reports 1999, p. 90, para. 67(4) ("[T]he Government of Malaysia has the obligation to communicate this Advisory Opinion to the Malaysian courts, in order that Malaysia's international obligations be given effect and [the Special Rapporteur's] immunity be respected".)

[87] *See Vienna Convention on Consular Relations (Paraguay v. United States of America), Order of 9 April 1988, I.C.J. Reports 1998*, p. 257, para. 38 (hereinafter, this order will be referred to as "*Breard*").

[88] *See* Mexico Memorial, para. 407.

make such policy choices for the United States[89]. The Court should state what the VCCR obliges its States Parties to do, but it has no proper role to determine highly specific means by which a State Party should implement those obligations as a matter of municipal law, nor should it rewrite the Convention to establish requirements that go beyond the four corners of the original text[90]. The Court lacks jurisdiction under the VCCR to evaluate the efficacy of the United States federal and state criminal justice systems, or to determine whether they are administered in a fashion that comports with international or municipal legal principles of substantive and procedural due process. There are appropriate fora in which such questions can be and are regularly considered and determined, but the Optional Protocol does not make this Court one of them.

3.11 Finally, 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[91]. This Court's jurisdiction under the VCCR's Optional Protocol does not reach these questions, nor allow this Court to create new rights that would fundamentally and substantively transform the VCCR into something the drafters

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[89] *See South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, p. 48, para. 89 ("[T]he Court is not a legislative body. Its duty is to apply the law as it finds it, not to make it.")

[90] The Court has repeatedly made clear that treaty interpretation cannot be a vehicle for revising treaty obligations, nor for reading into them what they did not contain expressly or by clear implication. *See, e.g., Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962*, p. 159; *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, p. 48, para. 91; *Oppenheim's International Law, Vol.1, Parts 2-4*, p. 1271 & n.4 (R. Jennings & A. Watts, eds., 1992) (hereinafter, this book will be referred to as "*Oppenheim's*"), Annex 23, Exhibit 61.

[91] In *LaGrand* the Court declined to consider Germany's contention that the requirements of the VCCR had "assumed the character of a human right." *LaGrand, Judgment*, para. 78.

did not have in mind.

CHAPTER IV

THIS COURT SHOULD FIND SIGNIFICANT ASPECTS OF MEXICO'S APPLICATION AND SUBMISSION INADMISSIBLE

4.1 The existence of jurisdiction does not, alone, open the door to this Court's resolution of a dispute. The Court has repeatedly recognized that there are instances in which it would be imprudent for it to intervene in disputes not susceptible of effective resolution without overstepping proper judicial bounds, as well as in issues that could, were the Court to address them, risk compromising the integrity of the Court's judicial character and function[92]. These prudential considerations are "circumscribed by inherent limitations which are none the less imperative because they may be difficult to catalogue, and may not frequently present themselves as a conclusive bar to adjudication in a concrete case. Nevertheless, it is always a matter for the determination of the Court whether its judicial functions are involved"[93]. 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. Assessing admissibility involves careful analysis of the particular characteristics of cases and claims, the positions of the parties, the role and responsibilities of the Court in the international system, and the application of the Statute and Rules of the

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[92] *See Northern Cameroons, Preliminary Objections, Judgment, I.C.J. Reports 1963*, p. 29; *Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 429, para. 84; Shabtai Rosenne, *The Law and Practice of the International Court, 1920-1996: Jurisdiction, Vol. II*, pp. 546-547 (1997), Annex 23, Exhibit 62.

[93] *Northern Cameroons, Preliminary Objections, Judgment, I.C.J. Reports 1963*, p. 30.

Court.

4.2 Mexico's submissions in at least five respects raise matters that the Court cannot or should not attempt to resolve. First, Mexico's submissions should be found inadmissible because they seek to have this Court function as a court of criminal appeal[94]. There is no other apt characterization of Mexico's two submissions in respect of remedies. Under this Court's holding in *LaGrand*, if Mexico is able to prove that there have been one or more breaches of Article 36, the Court should decide whether the United States provides review and reconsideration. As set out in detail in this Counter-Memorial[95], the United States allows this review and reconsideration in the operation of its judicial system and the executive clemency process. There is no basis for the Court to consider each case involving a breach separately, once it is satisfied that the review and reconsideration called for in *LaGrand* is available in any case where a breach of the VCCR is alleged[96].

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[94] The Court in *Breard* disclaimed any willingness so to be used, *see Breard*, p. 257, para. 38, and it crafted a remedy in *LaGrand* that kept it well clear of any such function. *See LaGrand, Judgment*, para. 52. Mexico's submission indicates that it believes this Court was mistaken in *LaGrand* when it reiterated its holding in *Breard*. *See generally* Mexico Memorial, Chapter VI, paras. 346-406.

[95] *See infra* Chapter VI.D.2-3.

[96] *See, e.g., Dispute Concerning Access to Information Under Article 9 of the Ospar Convention, (Ireland v. United Kingdom of Great Britain and Northern Ireland), Final Award, 2 July 2003*, Permanent Court of Arbitration (Declaration of Prof. Reisman), para. 14, *available at* http://www.pca-cpa.org/ENGLISH/RPC/OSPAR%20final%20award%20revised.pdf, Annex 23, Exhibit 63 ("States must ensure that their municipal laws enable full effect to be given to the consular rights and obligations enumerated in Article 36(1). . . . The only international claim that lies [under Article 36(2)] is that the respondent State failed to ensure that its municipal law was created or structured in such a way as to accomplish the objectives prescribed by the Convention. A direct claim for failure to accomplish those objectives in a specific case . . . does not lie

4.3 Mexico tries to make it appear that its requested automatic and categorical remedy, vacating convictions and sentences where a breach of the VCCR has occurred, will likewise require no case-by-case parsing of facts. Mexico may have settled on this proposed remedy precisely to make it more appealing to the Court in light of the reluctance the Court properly expressed in *Breard* to immerse itself into the business of criminal appeals. But if Mexico's radical remedy were to become the rule, it should be expected that every criminal conviction of a foreign national for a serious felony will be brought to this Court routinely – and not just against the United States. Mexico would ask this Court to reconcile conflicting facts and decide, for example, whether the United States courts correctly decided that an incriminating statement was made before an arrest or after, or whether the defendant was informed that he could request consular notification and opted against it, or was not informed at all, or whether and when an individual claimed he was a citizen of the receiving State.

4.4 Moreover, were this Court in some way to calibrate the remedies sought by Mexico – that is, to adopt a more individualized remedy than the automatic rules Mexico demands – then it would be put in the untenable position of substituting its own judgment for that of United States officials in reviewing and reconsidering the facts and law relevant to a conviction and sentence in light of an alleged breach of Article 36.

4.5 Second, 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.

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because that is not how the specific obligation imposed by the relevant treaty provision is framed"). (construing *LaGrand, Judgment*).

Exhaustion is a well-established principle of international law[97], and it is well-settled that failure to exhaust municipal remedies renders such a claim inadmissible[98]. The importance of exhaustion has been aptly explained by Judge Córdova, in his separate opinion in the *Interhandel* case:

> The main reason for its existence lies in the indispensable necessity to harmonize the international and the national jurisdictions – assuring in this way the respect due to the sovereign jurisdiction of States – by which nationals and foreigners have to abide and to the diplomatic protection of the Governments to which only foreigners are entitled. This harmony, this respect for the sovereignty of States is brought about by giving priority to the jurisdiction of the local courts of the State in cases of foreigners claiming against an act of its executive or legislative authorities. This priority, in turn, is assured only by means of the adherence to the principle of exhaustion of local

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[97] *See Interhandel, Preliminary Objections, Judgment, I.C.J. Reports 1959*, p. 27; Chittharanjan F. Amerasinghe *Jurisdiction of International Tribunals*, p. 259 (2003), Annex 23, Exhibit 64; Fitzmaurice, *supra* note 80 at p. 686, Annex 23, Exhibit 60. The Court has found the exhaustion requirement so important a principle of customary international law that it held that the requirement of exhaustion may not be assumed to have been dispensed with under a treaty unless that treaty expressly so provides. *Elettronica Sicula S.p.A. (ELSI), Judgment, I.C.J. Reports 1989*, p. 42, para. 50.

[98] *See* Amerasinghe, *supra* note 97 at pp. 284-285, Annex 23, Exhibit 64; Fitzmaurice, *supra* note 80 at p. 691, Annex 23, Exhibit 60; International Law Commission, *Draft articles on the Responsibility of States for internationally wrongful acts adopted by the International Law Commission at its 53rd session*, Supplement No. 10 (A/56/10), 2001, Nov., art. 44(b), Annex 23, Exhibit 65.

remedies[99].

4.6 This Court has emphasized that, not only is exhaustion of remedies a fundamental requirement of international law, "*[a] fortiori* the rule must be observed when domestic proceedings are pending . . ."[100].

4.7 The requirement of exhaustion of claims in international law encompasses both procedural default and the timely raising of claims. When a person fails, for example, to sue in national courts 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. Arbitral cases such as *Ambatielos*[101] make clear that, where the breach could have been challenged in a timely fashion at the state level – but was not – the fact that in such circumstances the challenge could not be made at the federal level breaches no rule of international law.

4.8 Knowledge of the requirements of Article 36(1)(b) may well exist in fact, in the defendant, in his lawyer, or in his government, regardless of whether the receiving State itself provided consular information and notification. Certainly knowledge must be presumed in any case where Mexican consular officers had actual knowledge of a defendant's

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[99] *Interhandel, Preliminary Objections, I.C.J. Reports 1959*, p. 45 (Separate Opinion of Judge Córdova).

[100] *Interhandel, Preliminary Objections, Judgment, I.C.J. Reports 1959*, p. 27.

[101] *See Ambatielos Claim, (Greece v. United Kingdom), 12 U.N.R.I.A.A. 83, 1956*, pp. 83, 122 ("It would be wrong to hold that a party who, by failing to exhaust his opportunities in the Court of first instance, has caused an appeal to become futile should be allowed to rely on this fact in order to rid himself of the rule of exhaustion of local remedies."), Annex 23, Exhibit 66. *See also Cardot v. France*, 200 Eur. Ct. H.R. (series A) para. 34 (1991), Annex 23, Exhibit 67; *Barberà, Messegué and Jabarodo v. Spain*, 146 Eur. Ct. H.R. (series A), para. 59 (1988), Annex 23, Exhibit 68.

detention because, as Mexico asserts repeatedly, when it learns of a case, Mexico provides legal assistance to the defendant[102]. Yet, in at least eleven of the fifty-four cases before the Court today, even with the provision of consular assistance, the defendant failed to raise a VCCR claim at trial[103].

4.9 Failure of exhaustion cannot be excused on the basis of some generalized argument that pursuit of such remedies within the United States system would be pointless because they are unlikely to yield favorable results. As Judge Lauterpacht observed, the exhaustion requirement may only be dispensed with when it is "conclusively proven" that municipal remedies would be refused. In other circumstances, "however contingent and theoretical these remedies may be, an attempt ought to have been made to exhaust them"[104]. As Judge Fitzmaurice explained: "what there must be a reasonable possibility of is the *existence* of a possibly effective remedy, and . . . the mere fact that there is no reasonable possibility of the claimant *obtaining* that remedy, because his case is legally unmeritorious, does not constitute the type of absence of reasonable possibility which

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[102] *See, e.g.*, Mexico Memorial, paras. 34-39 and Annex 7, paras. 4-15, 30-32; Annex 7, Appendix A, paras. 20, 37, 74, 360.

[103] For example, #3 Benavides (failed to raise VCCR claim at trial despite Mexican consulate learning of detention approximately six months before trial); #7 Esquivel Barrera (consulate learned through media coverage and had contact with the defendant prior to trial, but no claim was raised); #14 Manriquez Jaquez (consulate learned two years prior to trial, but failed to raise VCCR claims at trial); #39 Moreno Ramos (failed to raise VCCR claim at trial or on appeal, despite Mexican consulate learning of his case before trial); #49 Camargo Ojeda (failed to raise VCCR claims at trial, in direct appeals, and in post-conviction proceedings, despite Mexican consulate's learning of his case four months prior to trial); #54 Reyes Camarena (failed to raise VCCR claim at trial despite Mexican consulate learning of his case seven months before trial); *see also* #6 Covarrubias Sanchez, #9 Hoyos, #22 Salcido Bojorquez, #27 Verano Cruz, and #29 Zamudio Jimenez, all of whom similarly failed to raise a VCCR breach at trial.

[104] *See Certain Norwegian Loans, Judgment, I.C.J. Reports 1957*, p. 39 (Separate Opinion of Sir Hersch Lauterpacht).

will displace the local remedies rule"[105]. Accordingly, it would be for Mexico to show that, as to each of the fifty-four cases in which remedies were not exhausted, there was no possibly effective remedy in that particular case. This Mexico has not done, nor could it. The courts and the clemency boards sit precisely for this purpose and, as demonstrated *infra*, they do render effective remedies. This cannot be gainsaid on the basis of Mexico's complaint that the remedies do not entail automatic suppression of evidence or granting of new trials or sentencing hearings.

4.10 In sharp contrast to Germany's approach in *LaGrand*[106], Mexico ignores this difficulty entirely. This is not surprising, since Mexico has attached no proof that each of the alleged Mexican nationals has raised the VCCR argument in available judicial and administrative proceedings since becoming aware of a possible breach of United States obligations under the VCCR.

4.11 In addition to the inadmissibility of the claims of those of the fifty-four named Mexican nationals who did not raise the alleged breach of the VCCR obligation in their cases once they were aware of it, there is the further point that all of the fifty-four cases are inadmissible because local remedies remain available in every case. As explained in detail in Chapter VII of this Counter Memorial, fifty of the fifty-four cases are still pending before United States courts. And in all cases clemency review remains a possibility or, as in the three Illinois cases, has already resulted in commutations of sentences. The clemency

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[105] Fitzmaurice, *supra* note 80 at p. 694 (emphasis in original), Annex 23, Exhibit 60.

[106] *See LaGrand, (Germany v. United States of America)*, Memorial of the Federal Republic of Germany, Vol. I, part 5; Oral Argument, *LaGrand, (Germany v. United States of America)*, CR 2000/27 (Simma), part VIII, para. 6; Oral Argument, *LaGrand, (Germany v. United States of America)*, CR 2000/30 (Simma), part II, paras. 8-9.

process allows the defendants to request review and reconsideration of their convictions or sentences in light of any breach of Article 36. Insofar, therefore, as Mexico claims that the United States has failed to provide review and reconsideration of a conviction or sentence in any of these fifty-four cases, local remedies have not been exhausted and the Court should find the claim inadmissible as the purported lack of review and reconsideration is not yet ripe for review.

4.12 The third respect in which Mexico's claims are inadmissible relates to those of the fifty-four named Mexican nationals who were nationals of the United States at the time of their arrest or detention[107]. We are unaware of any dispute over the principle that the obligations of Article 36 pertain only to persons who are not nationals of the receiving State. It may be that Mexico has simply been careless in this regard, but it has not established in its Memorial that it may exercise diplomatic protection before this Court based on breaches of Mexico's rights established by the VCCR with respect to those of its nationals who are also nationals of the United States[108]. In the absence of any such showing, its claims in respect of such nationals should be rejected.

4.13 The Mexican claim is inadmissible in a fourth respect.

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[107] *See infra* note 334 and accompanying text.

[108] The ability of a State to assert claims on behalf of its nationals who are also nationals of the State against which the claim is asserted is limited to contexts in which the national had rights that were owed but breached. In the context of the VCCR a receiving State assumes no obligations vis-à-vis its own nationals, and therefore the question of asserting a claim based on a breach of the VCCR with respect to its own national does not arise. In any event, this Court has made clear that a State may assert a claim on behalf of a national against another State whose nationality the person also holds only if the person's "real and effective" nationality is that of the claiming state. *Nottebohm, Second Phase, Judgment, I.C.J. Reports 1955*, p. 24. Even if the VCCR did give Mexico rights with respect to dual nationals, Mexico has made no showing of real and effective nationality.

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 VCCR but failed to bring such breach to the attention of the United States or did so only after considerable delay[109]. Had Mexico promptly raised such cases with the United States, there would have remained the possibility of corrective action both in particular cases, and more generally. Mexico's frequent failures, over a period of many years, to bring these cases to the attention of United States authorities in a way that indicated concern about its ability to provide consular assistance to its nationals contributed to the situation of which Mexico now complains, by creating the clear impression that the United States was meeting its obligations to Mexico under the VCCR, as Mexico understood them[110].

4.14 The Mexican claim is inadmissible in a fifth respect. Mexico should not be allowed to invoke against the United States standards that Mexico does not follow in its own practice. Basic principles of administration of justice and the equality of States require that both litigants be held accountable to the same rules under international law[111]. Mexico cannot

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[109] *See Certain Phosphate Lands in Nauru, (Nauru v. Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 253, para. 32 ("The Court recognizes that, even in the absence of any applicable treaty provision, delay on the part of a claimant State may render an application inadmissible"); Fitzmaurice, *supra* note 80 at p. 439, Annex 23, Exhibit 60 (noting that substantive admissibility of a claim has been challenged "on grounds of undue delay in bringing it"); *see also* International Law Commission, *Draft articles on the Responsibility of States for internationally wrongful acts adopted by the International Law Commission at its 53rd session*, Supplement No. 10 (A/56/10), 2001, Nov., art. 45 (Loss of the right to invoke responsibility), Annex 23, Exhibit 65.

[110] *See* Compliance Declaration, para. 13, Annex 1.

[111] *See, e.g., Diversion of Water from the Meuse, Judgment, 1937, P.C.I.J., Series A/B, No. 70*, p. 20 (treaty to be interpreted so as not to impose a

seek application against the United States of alleged standards for compliance under VCCR Article 36 that it evidently does not accept for itself. The Court noted in *LaGrand* 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"[112]. If Mexico is to assert that breaches of Article 36 in the context of serious crimes risking severe penalties entitle defendants to the extraordinary remedies Mexico seeks, then Mexico must demonstrate that its system of criminal justice too requires remedies such as suppression of evidence or annulment of criminal convictions or sentences in cases in which a foreign national defendant is facing serious charges or severe penalties on the basis that Mexico has failed to meet its obligations under Article 36 without delay.

4.15 Quite the contrary, Mexico's Memorial spends considerable effort discussing *vacatur* and exclusionary rules in several jurisdictions and in the practice of several international tribunals. But it notably omits any discussion of Mexican law, except for one brief mention in Paragraph 376 and accompanying footnote 459, which merely records that all evidence must be consistent with Mexican law and that, since the early 1990s, Mexican law excludes confessions unless they are given in front of Mexico's Public Ministry or a judge and in the presence of counsel or a person of confidence. This law does not expressly exclude a confession under circumstances in which Article 36 has been breached. Moreover, Mexican law does not require the presence of a consular officer as a prerequisite to the taking of a defendant's statement or its

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significantly greater burden on any one party than on the other, absent manifest contrary intention of the parties).

[112] *LaGrand, Judgment*, para. 63.

admission into evidence[113]. In order to sustain its burden here, Mexico must demonstrate, at a minimum, that it would provide to foreign nationals accused of murder or other serious crimes, where such defendants have not been informed of the requirements of the VCCR, *vacatur* of any conviction or sentence, and exclusion at a new trial of all evidence taken by Mexican authorities after the breach occurred. This Mexico cannot do. In fact, although Mexican law generally requires the immediate notification of a detained foreign national's consulate[114], there is not a single recorded case in Mexico that has resulted in the exclusion of evidence – much less the vacation of a conviction or remittal of sentence – where the requirement of Article 36 was not met[115].

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[113] *See* Declaration of Dr. Jesús Zamora Pierce, (hereinafter, this declaration will be referred to as the "Zamora Pierce Declaration"), para. 24, Annex 5.

[114] *See* Leyes y Códigos de México, Código Federal de Procedimientos Penales, art. 128.IV (1995), Annex 23, Exhibit 69.

[115] *See* Zamora Pierce Declaration, para. 25, Annex 5; Declaration of Alexander Richards (hereinafter, this declaration will be referred to as the "Richards Declaration"), para. 13, Annex 6.

CHAPTER V

THE *LAGRAND* JUDGMENT SETS FORTH THE PRINCIPLES APPLICABLE TO THE DISPUTE PRESENTED TO THE COURT

5.1 In this case, the Court is asked to interpret and apply two specific provisions of the VCCR. First, Mexico places in issue Article 36(1)(b), which provides for any foreign national taken into custody by a State Party that:

> 1. With a view toward facilitating the exercise of consular functions relating to nationals 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.

Mexico asserts that the concluding sentence in Article 36(1)(b) requires that a person be informed of the possibility of consular notification immediately and before he or she is questioned[116]. According to Mexico, if the detained person so requests, the consular officer must then be notified immediately, again before the detainee is questioned. Finally, Mexico would require that

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[116] *See* Mexico Memorial, paras. 191-199.

the questioning not be initiated until after the consular officer has decided whether or not to render consular assistance. Mexico even appears to go so far as to suggest that, if the consular officer declines to respond, questioning may not occur[117]. A failure to comply with Article 36(1)(b), Mexico claims, should be remedied by barring use of any statement taken from him or her that precedes these steps[118]. The United States disagrees.

5.2 Second, Mexico asserts a dispute involving Article 36(2), which provides:

> 2. 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.

Mexico contends that the proviso of this paragraph requires that the laws of the United States – and presumably of all States Parties to the VCCR – must provide that, in all cases in which consular information is not provided immediately and before any statement is taken, the foreign national is entitled to a new trial in which any statement he or she has provided before receiving consular information is excluded from evidence[119]. The United States once again disagrees.

5.3 This Court has previously construed Article 36, including the appropriate remedy for breaches of it, in the *LaGrand* case. In *LaGrand*, the competent arresting authorities

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[117] *See* Mexico Memorial, para. 321.
[118] *See* Mexico Memorial, paras. 374-380.
[119] *See generally* Mexico Memorial, paras. 357-380.

believed that the LaGrand brothers were United States citizens at the time of their 1982 arrest. The United States conceded, however, that competent authorities who later assumed responsibility for the brothers' detention may have known that the brothers were in fact German, and not United States, citizens before their trial and certainly before they were sentenced in December 1984, yet did not provide them with consular information[120]. Moreover, German consular officials did not in fact learn about the brothers' detention until 1992. The Court found 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 had breached its obligations to Germany and to the LaGrand brothers under Article 36(1)(b)[121].

5.4 In *LaGrand*, the brothers' claims that Arizona had failed to comply with Article 36(1)(b) were raised judicially in their first federal *habeas* petition but were rejected (in 1995) on grounds of procedural default because they had not been raised in prior state court proceedings, which had ended before Germany had actual notice of the LaGrands' situation[122]. The Court further concluded that, "by not permitting the review and reconsideration, in light of the rights set forth in the Convention, of the convictions and sentences of the LaGrand brothers after the violations [of Article 36(1)(b)] . . . had been

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[120] *See LaGrand, Judgment*, paras. 15-16; United States Department of State, *Karl and Walter LaGrand: Report of Investigation into Consular Notification Issues*, 17 Feb. 2000, submitted as Exhibit 1 to the United States Counter Memorial in *LaGrand* (hereinafter, this report will be referred to as the "*LaGrand* Report"), pp. 4-8, Annex 23, Exhibit 79.

[121] *See LaGrand, Judgment*, para. 128(3).

[122] *See LaGrand, Judgment*, paras. 17-23.

established", the United States had breached Article 36(2)[123]. That is, the procedural default rule as applied in those two specific cases had occasioned a breach of Article 36(2) by preventing review and reconsideration of the conviction and sentence that gave full effect to the purposes of Article 36(1)(b). The Court stated expressly that it had not found that any United States law, whether substantive or procedural, was inherently inconsistent with the obligations of the United States under the VCCR. "[T]he 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"[124].

5.5 Finally, in addressing the question of remedies for these breaches, the Court took note of the commitment of the United States to improve compliance with Article 36(1)(b) but held 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"[125].

5.6 The Court's judgment in *LaGrand* thus determined that Article 36(2) should be understood in part as a remedial provision where there has been a breach of Article 36(1)(b). Where a national of a State Party is not informed of the requirements of Article 36(1)(b), receiving State laws and regulations must nevertheless enable "full effect to be given to the purposes for which the rights [were] accorded" under

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[123] *LaGrand, Judgment*, para. 128(4); *see also LaGrand, Judgment*, para. 91.
[124] *LaGrand, Judgment*, para. 125.
[125] *LaGrand, Judgment*, para. 128(7).

Article 36[126]. More specifically, "review and reconsideration" would meet this requirement of giving full effect, and is the remedy decreed by the Court for a breach of Article 36(1)(b) where the individual subject to the breach has been sentenced to prolonged detention or severe penalties[127].

5.7 The Court's decisions are only binding on the parties to the case before it, and the decision in one case has no necessarily determinative function in later cases involving different parties[128]. The United States has nonetheless followed the guidance, contained in the separate Declaration of then-President Guillaume, that the principles and reasoning of the Court's decision in *LaGrand* should be taken into account in future capital cases alleging breach of the VCCR. President Guillaume stated, with respect to paragraph 128(7) of the

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[126] VCCR art. 36(2), Annex 23, Exhibit 1; *see also LaGrand, Judgment*, para. 91.

[127] *See LaGrand, Judgment*, para. 125.

[128] *See* Statute of the International Court of Justice, 26 June 1945, 59 Stat. 1055, art. 59 (hereinafter, this Statute will be referred to as the "I.C.J. Statute"). Article 59 provides that a decision "has no binding force except between the parties and in respect of that particular case", I.C.J. Statute, art. 59, but it is well-settled that a decision may serve as authority beyond a particular case. Indeed, were there no possibility of any effect beyond parties to a particular case, there would be no need for the Statute's provision permitting a State to request to intervene in a case where it considers "that it has an interest of a legal nature which may be affected by the decision in the case". I.C.J. Statute, Article 62. Moreover, there is no doubt that the Court considers its previous decisions when evaluating cases before it. *See* Mohamed Shahabuddeen, *Precedent in the World Court*, pp. 26-31 (1996), Annex 23, Exhibit 70; Rosenne, *The Law and Practice of the International Court*, *supra* note 92 at pp. 1609-1611, Annex 23, Exhibit 62; *Oppenheim's*, *supra* note 90 at pp. 1268-1269 n.5, Annex 23, Exhibit 61. The Statute expressly directs the Court, in considering and deciding cases, to apply "subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law". I.C.J. Statute, art. 38. This surely includes the Court's own decisions.

Court's *dispositif*, that: "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"[129]. Evidently the President, knowing that there are many States Parties to the VCCR, wished to advise potential litigants that similar cases brought to the Court should expect to receive the same remedy the Court ordered in *LaGrand*. Mexico's suggestion that *LaGrand*'s treatment of the remedy issue was in some way incomplete (because the LaGrands had been executed while Mexico's nationals have not) flies in the face of this Declaration, which is directed specifically to the remedy and announces that the Court does not expect that issue to be litigated again[130]. This Declaration means that, while the Court's decision in *LaGrand* could not be legally binding on parties in other cases, the Court's reasoning regarding the required remedy for a breach of Article 36(1)(b) would not be contradicted in future cases. President Guillaume's statement sets forth a clear judicial policy and reflects the long-standing practice of the Court[131]. It

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[129] *LaGrand, Judgment* (Declaration of President Guillaume).

[130] The Mexican position also ignores the fact that review and reconsideration is obviously a remedy directed to future cases, not to the cases of the LaGrands themselves.

[131] *See Land and Maritime Boundary Between Cameroon and Nigeria, Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 292, para. 28 ("It is true that in accordance with Article 59, the Court's judgments bind only the parties to and in respect of a particular case. There can [thus] be no question of holding Nigeria to decisions reached by the Court in previous cases. The real question is whether, in this case, there is cause not to follow the reasoning and conclusions of earlier cases."); *Application for Review of Judgment No. 273 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1982*, p. 355, para. 57 (answer to legal question before this Court "must depend not only upon the terms of Article 11, but also upon several other factors including, first of all, the Court's Statute, [as well as] the case-law of the Court . . .".); *Aegean Sea Continental Shelf,*

should be followed by the Court in this case. The reasoning led the Court to conclude that "review and reconsideration" was the appropriate remedy for German nationals in the event of a breach of Article 36. It would likewise counsel that review and reconsideration is the appropriate remedy for similarly situated Mexican nationals. The nationality of the underlying defendants is irrelevant to the appropriate remedy. A different interpretation of Article 36 in this case would undermine the consistency of the Court's reasoning and case law, damage the Court's credibility, and introduce an element of confusion into relations between States Parties to the VCCR.

5.8 As noted, the United States and Mexico disagree fundamentally on the interpretation of Article 36(1)(b) and 36(2). The Court in *LaGrand* interpreted Articles 36(1)(b) and 36(2). The United States has adhered to that interpretation and its applicability here. Thus, the question is "whether, in this case, there is cause not to follow the reasoning and conclusions"[132] of *LaGrand*. The United States does not agree that breaches of Article 36(1)(b) and 36(2) occurred in each of

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Judgment, I.C.J. Reports 1978, pp. 16-17, para. 39 ("[a]lthough under Article 59 of the Statute 'the decision of the Court has no binding force except between the parties and in respect of that particular case', it is evident that any pronouncement of the Court as to the status of [a treaty], whether it were found to be a convention in force or to be no longer in force, may have implications in the relations between States other than" those before the Court); *Nottebohm, Second Phase, Judgment, I.C.J. Reports 1955*, p. 22 ("The same issue is now before the Court: it must be resolved by applying the same principles."); Rosenne, *The Law and Practice of the International Court*, *supra* note 92 at pp. 1628-1631, Annex 23, Exhibit 62; *Oppenheim's*, *supra* note 90 at pp. 1268-1269 n.5, Annex 23, Exhibit 61; *cf. Certain German Interests in Polish Upper Silesia, Merits, Judgment No. 7, 1926, P.C.I.J., Series A, No. 7*, p. 19 (purpose of Art. 59 of Statute "is simply to prevent legal principles accepted by the Court in a particular case from being binding upon other States or in other disputes").

[132] *Land and Maritime Boundary Between Cameroon and Nigeria, Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 292, para. 28.

the fifty-four cases brought before this Court by Mexico. Despite this, the United States is complying with the remedy articulated in *LaGrand*, which provides for case-by-case review and reconsideration of the conviction and sentence in cases where the defendant is sentenced to severe penalties, taking account of any breach of Article 36(1)(b). The United States is providing this remedy in the event of breaches[133]. In none of the fifty-four cases reviewed in Mexico's Memorial has it been shown that this remedy is unavailable; indeed, in three of them the sentences have already been commuted, taking into account the alleged breaches of Article 36[134].

5.9 Mexico's Memorial professes a commitment to the principles articulated in *LaGrand*, but it does not accept them. Mexico's position is that any breach of the concluding clause of Article 36(1)(b) of the VCCR, however insignificant its impact on the course of a case, must result in a new trial or sentence and, in addition, that any evidence, such as statements or confessions, given by a foreign national in custody prior to receiving information about consular notification should be deemed automatically inadmissible and excluded from evidence in any trial[135]. These extraordinary remedial requests are premised on an unsustainable interpretation of the obligations imposed by Article 36(1)(b) and 36(2), as we will demonstrate.

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[133] *See* Oral Argument, *Avena and Other Mexican Nationals, (Mexico v. United States of America)*, CR 2003/2 (Taft), p. 10, para. 1.10. ("The Court made clear in *LaGrand* that the United States could use means of its own choosing to allow review and reconsideration. In the wake of *LaGrand*, we have chosen means that have succeeded in securing review and reconsideration in every case when a consular notification violation had occurred and the death penalty was to be imposed. I can assure the Court that the United States will continue to employ these measures, which have proved effective in every case so far and which there is no basis to believe will not be effective in future cases.").

[134] These are #45 Caballero Hernandez, #46 Flores Urbán, and #47 Solache Romero. *See* Cases Declaration, corresponding Appendices, Annex 2.

[135] *See* Mexico Memorial, paras. 346-380, 407.

They are also fundamentally at odds with the remedy prescribed by the Court in *LaGrand*. Mexico clearly does not accept this Court's conclusion that United States laws on procedural default are not inherently inconsistent with the receiving State's obligations under the VCCR[136]. Thus, Mexico plainly invites the Court to consider whether it erred fundamentally in *LaGrand*. The United States submits that the Court should adhere to the remedy that it adopted in that case and reject Mexico's request to change it.

[136] *See* Mexico Memorial, paras. 226-235.

CHAPTER VI

THE UNITED STATES COMPLIES WITH ALL OF THE OBLIGATIONS UNDER ARTICLE 36 OF THE VCCR

6.1 In this Chapter, the Counter-Memorial will discuss the obligations created by Article 36, identify the two core disputes between the Parties about the application of Article 36, and explain why the United States has offered the correct interpretation. The principles elaborated in the Court's decision in *LaGrand* support this interpretation. This section will also explain how the United States has acted to address its obligations under the VCCR, and why it is in full compliance with Article 36(2).

A. The Rules of Treaty Interpretation

6.2 The Vienna Convention on the Law of Treaties, in an article reflecting customary international law, states that a treaty: "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose"[137]. The context for the purposes of interpretation comprises "the text, including its preamble and annexes"[138]. The VCLT further provides that there "shall be taken into account, together with the context . . . [a]ny subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" and "any relevant rules of

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[137] Vienna Convention on the Law of Treaties, 23 May 1969, art. 31(1), 1155 U.N.T.S. 331, Annex 23, Exhibit 71 (hereinafter, this Convention will be referred to as the "VCLT"); *accord Polish Postal Service in Danzig, Advisory Opinion, 1925, P.C.I.J., Series B, No. 11*, p. 39. The United States has not ratified the VCLT; however, it recognizes that many of its provisions reflect customary international law.

[138] VCLT, art. 31(2), Annex 23, Exhibit 71. Also relevant are related agreements, if they exist (which, in the case of the VCCR, they do not).

international law applicable in the relations between the parties"[139]. The way in which States Parties (or at least a great number of them) carry out their obligations under the VCCR is highly instructive as to what they understood the VCCR to require of them, since States Parties customarily are presumed to carry out their treaty obligations in good faith[140]. As explained *infra*, neither the text nor State practice supports Mexico's reading of either Article 36(1) or 36(2); indeed, they show that Mexico's reading is untenable[141].

6.3 The interpretation of the text may be confirmed by reference to supplementary means "including the preparatory work of the treaty and the circumstances of its conclusion . . ."[142]. Thus, the Court may seek guidance from the *travaux*

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[139] VCLT, art. 31(3), Annex 23, Exhibit 71. In that same sub-article, the VCLT provides for the taking into account of "any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions". There is no such generally applicable subsequent agreement regarding the interpretation or application of the VCCR. Mexico has cited selectively to some of the United States congressional proceedings related to the bilateral prisoner exchange treaty concluded between the United States and Mexico (Treaty on the Execution of Penal Sentences, *supra* note 67, Annex 23, Exhibit 72), *see, e.g.*, Mexico Memorial, para. 198. That treaty is addressed in this Counter Memorial, and evidences an understanding of the import of breaches of Article 36 of the VCCR inconsistent with Mexico's position here. *See infra* note 288 and accompanying text.

[140] *See, e.g., Competence of the ILO in Regard to International Regulation of the Conditions of Labour of Persons Employed in Agriculture, Advisory Opinion, 1922, P.C.I.J., Series B, No. 2*, pp. 39-41; *Corfu Channel, Merits, Judgment, I.C.J. Reports 1949*, p. 25; *International Status of South West Africa, Advisory Opinion, I.C.J. Reports 1950*, pp. 135-136; *Temple of Preah Vihear, Merits, Judgment, I.C.J. Reports 1962*, pp. 34-35, *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962*, pp. 157-161.

[141] *See infra* at Chapter VI.B-C.

[142] VCLT, art. 32, Annex 23, Exhibit 71. This provision of the VCLT likewise reflects customary international law.

when the text of the treaty is not itself sufficiently clear[143]. As will be explained, Mexico's proposed interpretations find no support in the *travaux* either.

B. Mexico has Misconstrued and Overstated the Object and Purpose of Article 36

6.4 The object and purpose of the VCCR is to "contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems"[144]. The Convention emerged from an effort to codify "consular intercourse and immunities" practiced at the time, and its drafters believed that it would contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems. The Convention's seventy-nine articles address a wide range of issues associated with the everyday conduct of consular relations. The articles codify fundamental principles, such as the inviolability of consular premises and the establishment of consular posts, ensuring privileges and immunities, facilitating communications between the receiving State and consular officers, determining the applicability of local taxes, and the like.

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[143] As the Court has made clear, where the "text is sufficiently clear . . . [the Court] does not feel that it should deviate from the consistent practice of the Permanent Court of International Justice, according to which there is no occasion to resort to preparatory work if the text of a convention is sufficiently clear in itself". *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), Advisory Opinion, I.C.J. Reports 1947-1948*, p. 63; *see also "Lotus", 1927, P.C.I.J., Series A, No. 10*, p. 16; *Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, I.C.J. Reports 1950*, p. 8.

[144] VCCR, fourth preambular paragraph, Annex 23, Exhibit 1. The subject of the VCCR, it should be borne constantly in mind, is consular relations between States, not the operation of national criminal justice and law enforcement systems. Nor is it the establishment of human rights.

6.5 With that context in mind, the United States agrees with Mexico that consular officers may serve important functions when foreign nationals are detained. The assistance that consular officers may offer detainees, at least in the United States, is wide-ranging. They may make contact and facilitate communications with family and friends; they may monitor the conditions of detention to ensure that adequate food, clothing and medical care are provided; they may monitor criminal proceedings to see that a fair trial is granted; they may arrange for legal representation of the detainee; they may assist the detainee's attorneys in hiring experts or gathering mitigating evidence. In some other States, however, the consular officer's role is considerably more circumscribed by receiving State law or tradition[145].

6.6 Consular officers may also, in some cases, serve as a "cultural bridge"[146]. Mexico in fact highlights this function, and undoubtedly a consul can provide important information to the detainee who is unfamiliar with the legal system of the receiving State[147]. But this aspect of consular work should not be given the central importance that Mexico's Memorial attaches to it in the course of its effort to paint a picture of Mexican nationals in the United States with no meaningful understanding of the legal system in which they find themselves. In fact, whether a consular officer serves as a

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[145] For example, China, the Russian Federation, and Saudi Arabia all impose significant restrictions on the ability of the consular officer to discuss the underlying factual or legal case with the detainee during the pendency of the trial. *See* Declaration of Ambassador Maura A. Harty Concerning State Practice In Implementing Article 36 of the Vienna Convention on Consular Relations (hereinafter, this declaration will be referred to as the "State Practice Declaration"), para. 35, Annex 4.

[146] *See* Mexico Memorial, paras. 49-71 and Annex 28, p. A407; 7 *Foreign Affairs Manual* 401, Annex 23, Exhibit 74.

[147] *See* Mexico Memorial, Annex 28, pp. A407, A411; 7 *Foreign Affairs Manual* 401, 412, Annex 23, Exhibit 74.

"cultural bridge" will depend on how long the national has lived in the receiving State and what his or her experience there has been. It is difficult to see the relevance of the consular officer as a "cultural bridge", for example, in a case in which a detainee has lived in the receiving State for a lengthy period, or has had previous encounters with its criminal justice system, as is the case with at least forty-six of the fifty-four cases before the Court[148].

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[148] Examples of such persons can readily be found among the fifty-four cases before the Court: #1 Avena Guillen (lived in the United States eight years and extensive juvenile criminal record); #2 Ayala (lived most of his life in the United States and extensive criminal record); #4 Carrera Montenegro (moved to the United States when two-years-old and had prior conviction); #5 Contreras Lopez (moved to United States when six-years-old); #8 Gomez Perez (moved to the United States when seven-years-old and extensive criminal record); #10 Juarez Suarez (lived in United States intermittently for twelve years); #11 Lopez (lived in the United States eight years and several prior convictions); #12 Lupercio Casares (lived in the United States eighteen years and several prior convictions); #13 Maciel Hernandez (moved to the United States when three-years-old and extensive criminal record); #14 Manriquez Jaquez (lived in the United States for approximately 10 years and numerous prior arrests); #15 Fuentes Martínez (lived in the United States for at least 12 years and prior murder conviction); #16 Martinez Sanchez (moved to the United States when one-year-old and several prior convictions); #17 Mendoza Garcia (lived in the United States for 15 years and prior arrests); #18 Ochoa Tamayo (moved to the United States when approximately three-years-old and several prior convictions); #19 Parra Dueñas (lived intermittently in the United States for at least 18 years and record of prior minor offenses); #20 Ramirez Villa (moved to the United States at approximately one-year-old and extensive criminal record); #21 Salazar (moved to the United States when one-year-old and numerous prior arrests); #22 Salcido Bojorquez (lived in the United States for at least nine years and prior arrests); #23 Sanchez Ramirez (lived in the United States for at least 20 years and two prior convictions); #24 Tafoya Arriola (moved to the United States at age of 5 and prior arrests and conviction); #25 Valdez Reyes (lived in the United States for 19 years and extensive criminal record); #26 Vargas (lived in the United States for at least 11 years and prior conviction); #27 Verano Cruz (prior arrests); #28 Zambrano (in the United States for forty-four years, since infancy; one prior arrest); #29 Zamudio Jimenez (moved to the United States when five-years-old); #30 Alvarez

6.7 Further, it is important not to confuse the full extent of what a consular officer might choose or attempt to do with the limited functions of a consular officer under Article 36(1). Article 36(1) begins with a clear statement that its provisions are for "facilitating the exercise of consular functions." Subparagraph 1(a) states that a sending State has a general right of communication. This is the only relevant right when a national is free in the host country; the foreign national may communicate with his or her consular officer and seek assistance, and the consular officer may provide any assistance he or she wishes that is within the scope of the consular functions enumerated in Article 5 of the VCCR. Subparagraph 1(b) follows to address the special problem of communication

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(lived in the United States eight years and several prior arrests and conviction); #32 Garcia Torres (prior conviction); #33 Gomez (moved to the United States when five-years-old and multiple arrests); #35 Ibarra (six prior arrests); #36 Leal Garcia (moved to the United States when two-years-old); #37 Maldonado (lived in the United States for approximately 16 years and prior conviction); #38 Medellin Rojas (moved to the United States when a small child and seven prior arrests); #39 Moreno Ramos (lived in the United States for 20 years); #40 Plata Estrada (moved to the United States when four-years-old and three prior arrests and conviction); #41 Ramírez Cardenas (moved to the United States when three-years-old and several prior arrests); #42 Rocha Diaz (lived in the United States for six years and several prior arrests); #43 Regalado Soriano (moved to the United States when four-years-old and history of prior arrests); #44 Tamayo (lived in the United States nine years and prior conviction); #45 Caballero Hernandez (lived in the United States thirteen years and two prior arrests) #46 Flores Urbán (moved to the United States when seven-years-old and several prior arrests); #47 Solache Romero (at least one prior arrest); #48 Fong Soto (lived in the United States for 10 years and several prior arrests); #49 Camargo Ojeda (lived in the United States for at least 12 years and prior conviction); #50 Alberto Hernandez (lived in the United States for at least 15 years); #52 Loza (lived in the United States for approximately 10 years, prior juvenile arrests); #53 Torres Aguilera (moved to the United States when five-years-old); #54 Reyes Camarena (lived in the United States intermittently for at least 15 years, extensive criminal record in the United States). *See* Cases Declaration, corresponding Appendices, Annex 2.

when a foreign national is detained, and thus no longer free to seek out his or her consular officer at will. It gives to a detained foreign national an opportunity to communicate with his or her consular officers and to have the consular officers notified of the detention – thus preventing a secret detention.

6.8 This subparagraph has another purpose, not addressed by Mexico, which is to give the detainee the discretion to reject consular notification because he or she may prefer, for privacy or other reasons, that the sending State government not be aware of or involved in his or her affairs[149].

6.9 Paragraph 1(c) has as its purpose permitting but not requiring the consular officer to render appropriate assistance to the detainee. It allows the sending State to determine the types and amount of consular assistance it will provide, if any, within the limitations prescribed by Articles 5 and 36 of the VCCR. It does not require that a consular officer visit or otherwise communicate with the detainee, (the officer may not be able to visit the detainee for some days, for example, or may decide not to visit or assist at all) but it permits him to do so. Likewise, it permits but does not require the consular officer to arrange for the detainee's legal representation. And it reiterates the overall control of the detainee, recognized in subparagraph 1(b), stating that the consular officer must refrain from taking action

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[149] The original International Law Commission proposal for Article 36, to require consular notification in all cases, was rejected in part for this reason. When introducing the "seventeen-power proposal", A/CONF.25/L.41, which was then further modified by A/CONF.25/L.49 and adopted by the conference, United Nations, *Conference on Consular Relations, Vol. I, Summary records of plenary meetings and the meetings of the First and Second Committees,* document A/CONF.25/16, 1963, p. 87, paras. 109, 112, Annex 23, Exhibit 7, the Tunisian representative indicated the reason the drafters had included "unless he expressly opposes it", was the need to take into consideration the prisoner's own freedom of choice. *Id.* at p. 82, para. 56. *See also* statements by United States, *id.* at p. 337, para. 39; the United Arab Republic, *id.* at 36, para. 10; Viet-Nam, *id.* at p. 37, paras. 16-17.

expressly opposed by the national.

6.10 It is not a purpose of Article 36, however, to create rights for nationals of the receiving State, including dual nationals. Nor is it a purpose of Article 36 to allow a consular officer to serve as a lawyer for the detainee, or to interfere with an investigation or to prevent the collection of evidence in accordance with the laws and regulations of the receiving State. It thus is not an object or purpose of Article 36 to prevent law enforcement officials from questioning a foreign national until that individual is informed of the possibility of consular assistance under the VCCR, until the individual actually requests consular notification, and until the consular officer arrives and renders assistance. Yet this is exactly how Mexico defines the object and purpose, in that Mexico asserts that: "[t]he presence of consular officials throughout interrogation provides an essential safeguard against . . . abuses . . . 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"[150]. This is not correct.

6.11 Nor is it an object and purpose of Article 36 to allow a consular officer to ensure that a foreign national understands his or her legal rights regarding the making of statements to the police before any statement is made. Article 36 merely contemplates that foreign nationals will be told that they may communicate with the consular officers, and be allowed to initiate such communications – if they so wish – after having been taken into custody. Article 36 does not even require that consular officers be given access to their nationals "without delay", and it has never been understood to require access before an interrogation. Whether a foreign national arrested for a criminal offense understands his legal rights before he or she

[150] Mexico Memorial, para. 321.

makes a statement is not for a consular officer to determine; it is a question specifically addressed by the person's lawyer, once obtained, and by the courts at a subsequent point in time.

6.12 These are only the most significant ways in which the Memorial overstates the role of the consular officer and misstates the purposes of Article 36. To justify the very particular and extraordinary remedy it seeks, Mexico then compounds the error by failing to distinguish among the three distinct obligations established in Article 36 and thus distorts Article 36. The first is the obligation in the concluding clause of subparagraph (1)(b) to inform the foreign national "without delay" of the "rights under this subparagraph"[151]. To prevent the confusion that Mexico has introduced, we refer to this undertaking as the obligation to provide "consular information". The second is the obligation, upon the detainee's request, to notify the consular post "without delay" of the detention, which we refer to as the obligation of "consular notification". Because this obligation arises *only* when consular notification is requested by the detained foreign national, a lack of consular notification at most raises a question whether the person detained received consular information; it does not necessarily indicate a breach of Article 36(1)(b). If the person detained is provided consular information and declines to request consular notification then no breach of Article 36(1)(b) occurs. The third relevant obligation is the obligation to permit the consular officer to have access to and communicate with the detained foreign national. This obligation is not in subparagraph (1)(b), but rather in subparagraph (1)(c)[152]. More importantly,

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[151] The "rights under this subparagraph" are: (1) the right, if the foreign national so requests, of the sending State consular post to be informed without delay of the fact of his or her detention; and (2) the right to have that communications be transmitted without delay from the detained foreign national to his consulate, Annex 23, Exhibit 1.

[152] "1. With a view to facilitating the exercise of consular functions relating to nationals of the sending state: . . . (c) consular officers shall have the right

subparagraph (1)(c) does not provide that the consular officer shall have a right to visit, converse, or correspond with the detainee "without delay".

6.13 Mexico jumbles these obligations and, in doing so, makes three significant errors. First, it wrongly assumes that failure to notify consular officers of an arrest or detention necessarily implies that Article 36(1)(b) was breached. This is wrong as a matter of law and fact. In reality, the vast majority of foreign nationals, including Mexican nationals, decline consular notification when given consular information. Mexico's mistake leads it to make a claim of systematic breaches of Article 36 by the United States that is unfounded, and to claim remedies for breaches that it has not proven[153].

6.14 Second, Mexico fails to recognize that the provision of consular information is a means to an end – ensuring that the consular officer is aware of the detention. While the obligation to provide consular information is important, the significance of a failure to provide such information clearly varies depending

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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." Annex 23, Exhibit 1.

[153] Mexico makes this error most clearly in paragraphs 159-168 of its Memorial and in Appendix B to the Declaration submitted as Annex 7 to the Memorial, when it cites 102 cases of alleged recent violations of Article 36. As the Compliance Declaration, paras. 52-55, Annex 1 and Annex 1, Appendix 4, explains, in many of these cases consular information was provided but notification was declined, consistent with statistical and anecdotal evidence that the vast majority of Mexican nationals decline consular notification when given consular information. Mexico's mistake is also seen in at least two of the fifty-four cases before the Court (# 10 Juarez Suarez; # 50 Hernandez Alberto). *See* Cases Declaration, corresponding Appendices, Annex 2.

on whether and when consular notification occurs in fact. It is not unusual for family or friends to notify a consular officer of an arrest immediately, and well before the competent authorities can do so, or for a detainee who is allowed to use the telephone to call the consulate directly. If the consular officer then contacts the detaining officials directly, and before they complete the process of providing consular notification, it would hardly be surprising if they concluded that the provision of notification was unnecessary. Any "breach" of Article 36(1)(b) in this context would be inconsequential. Thus, it is plainly inappropriate to equate the importance of consular information and consular notification. It is also inappropriate to assume that a failure to comply with one or the other is always significant as to whether the object and purpose of Article 36(1)(b) has been fulfilled.

6.15 Finally, Mexico conflates the requirements of subparagraph (1)(b), to inform and, if requested, to notify without delay, with the requirement of subparagraph (1)(c), to permit access. An example is when it states that: "Article 36 requires notification and access *without delay* to enable meaningful consular assistance"[154]. Through this sleight of hand, Mexico asserts the non-existent right of a consular officer to talk with a foreign national immediately upon his arrest or detention and before anything else happens, and thus to

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[154] Mexico Memorial, para. 191 (emphasis in original). Given that Article 36(1)(c) does not use the words "without delay", we assume that there is no dispute as to the meaning of that Article. To the extent that Mexico contests this, for example, as part of its effort to argue that Article 36 contemplates that consular officers must be present prior to and at an interrogation, *see, e.g.*, Mexico Memorial at para. 321, the United States disagrees. The United States also disagrees that a breach of Article 36(1)(b) necessarily results in a breach of Article 36(1)(c) or (a), except in the circumstances in which the Court found a breach in LaGrand – *i.e.*, that the consulate was "unaware of the detention" and was "prevented for all practical purposes from exercising its rights under Article 36, paragraph 1". *LaGrand, Judgment*, para. 74; *see also LaGrand* Report, pp. 8-9, Annex 23, Exhibit 79.

intervene immediately in a criminal investigation.

6.16 These inaccuracies infect Mexico's entire argument in fundamental ways, as we will further explain[155]. For the moment, however, we will focus on the question of the meaning of "without delay" in subparagraph (1)(b).

C. Article 36(1)(b) Obligates States to Provide Foreign Nationals With Consular Information Under the VCCR and to Notify Consular Officers When Requested "Without Delay", Meaning in the Ordinary Course of Business and Without Procrastination or Deliberate Inaction

6.17 The United States and Mexico dispute the meaning of the phrase "without delay" in two of the three places in which it is used in Article 36(1)(b). The more explicit dispute is over the meaning of "without delay" in the concluding sentence of Article 36(1)(b), which provides that: "The said authorities shall inform the person concerned without delay of his rights under this subparagraph." But there is also inherently a dispute over the meaning of the first sentence of subparagraph (1)(b) insofar as it 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

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[155] These three errors have particularly significant consequences for Mexico's remedial claims. The misconstruction of subparagraph (1)(b) leads Mexico to claim, in essence, a right to be notified of the arrest or detention of every Mexican national and for its consular officers to be permitted to meet with every arrested person, and to be physically present before or during any interrogation, in order to prevent the detainee from providing information to law enforcement authorities investigating a crime. *See, e.g.*, Mexico Memorial, paras. 208, 321. On this non-existent set of obligations then rests its extraordinary claim for a remedy barring use of statements given by Mexican nationals before they communicate with a consular officer.

custody pending trial or is detained in any other manner".

6.18 In addressing the question "how quickly" the detainee needs to be informed, the United States Department of State has provided federal, state, and local law enforcement officials the following guidance:

> *There should be no deliberate delay, and notification should occur as soon as reasonably possible under the circumstances.* Once foreign nationality is known, advising the national of the right to consular notification should follow promptly.
>
> In the case of an arrest followed by a detention, the Department of State would ordinarily expect the foreign national to have been advised of the possibility of consular notification by the time the foreign national is booked for detention. The Department encourages judicial authorities to confirm during court appearances of foreign nationals that consular notification has occurred as required[156].

6.19 In addressing how quickly notification must be made to the consular officer if requested, the Department of State has provided this guidance:

> The Department of State also considers "without delay" here to mean that *there should be no deliberate delay, and notification should occur as soon as reasonably possible under the circumstances.* The Department of State would

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[156] State Department Manual, *supra* note 73 at p. 20, Annex 21 (emphasis in original).

> normally expect notification to consular officials to have been made within 24 hours, and certainly within 72 hours. On the other hand, the Department does not normally consider notification . . . to be required outside of a consulate's regular working hours. In some cases, however, it will be possible and convenient to leave a message on an answering machine at the consulate or to send a fax even though the consulate is closed[157].

In United States practice, it has never been the case that consular information must necessarily be provided before a detainee can be questioned, or even that the information be given by a person involved in the interrogation process (as opposed, for example, by other competent authorities who have contact with the detained person, such as those responsible for booking). Mexico, however, contends that the Court should require the United States to change this practice. Acknowledging that the VCCR does not define the phrase "without delay"[158], Mexico argues that "without delay" should be interpreted as meaning "immediately *and* prior to any interrogation"[159]. Having keyed the obligation to specific acts of law enforcement authorities, Mexico then asks the Court to conclude that the United States breached the concluding sentence of Article 36(1)(b) because its competent authorities arrested Mexican nationals and interviewed them before providing them with consular information. Inherent in its argument is the further suggestion that notification to the consular officer "without delay" must be essentially immediate

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[157] State Department Manual, *supra* note 73 at p. 20, Annex 21 (emphasis in original).

[158] *See* Mexico Memorial, para. 182.

[159] Mexico Memorial, para. 204 (emphasis added); *see also* Mexico Memorial, para. 191.

and, in any event, must occur and be responded to before the foreign national can be questioned further, even if he has made clear his willingness to speak or is represented by counsel.

6.20 Mexico's definition of "without delay" is conceptually flawed, unsupported by the customary rules of treaty interpretation and, as a practical matter, would be unworkable and lead to absurd results. It would radically change the meaning of Article 36 and put virtually every State Party to the VCCR today in breach of its Article 36 obligations. Mexico's proffered definition should be rejected by the Court.

1. The Ordinary Meaning in Context Supports the Definition Given To "Without Delay" by the United States

6.21 When the words "without delay" are considered in light of their ordinary meaning and in their context, it is clear that Mexico's proposed definition is unsustainable. First, conceptually, it is self-evident that how long it takes to carry out the obligations under Article 36 depends on the circumstances. An act may take a long time, and yet be done "without delay" if, for example, the act is complex (many people arrested as a group), or if time is required to determine a person's identity or nationality (if he presents false or inconsistent information or documents). Likewise, an act could be completed in a short time, and yet have been delayed if the actor could conveniently have completed it more quickly, but elected not to do so. The actor's intention and actions, and the circumstances in which he finds himself, are plainly relevant, indeed key, to assessing whether he acted "without delay". The phrase in context is not simply a function of time.

6.22 The second prong of Mexico's proposed definition – its insertion of a "before interrogation" requirement – likewise is flawed. Consular information and law enforcement interrogations are not necessarily linked, certainly not in the

context of the VCCR, and there is no reason why questioning should be made contingent on a request for notification. In furtherance of ensuring that consular information is provided without delay, a State Party may provide that consular information will be given routinely when the person is taken before a judicial authority – an event that in many States Parties occurs within a few days of an arrest[160]. Or a State Party might provide that the information will be given by a prison official or by a social worker who will visit each detainee within the first day of detention[161]. In either case the information would be given without delay, but in neither case would it relate to the conduct of other regular government functions such as the interrogation of the person or other aspects of the related law enforcement investigation, which may be proceeding on an entirely different schedule to solve a crime while the evidence is fresh and to protect public safety. Nothing requires that the consular information be provided by the arresting officer as opposed to the investigator, magistrate or social worker[162]. The carrying out of a criminal investigation in particular has nothing to do with how quickly or slowly the information on consular

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[160] This is the practice, for example, in Argentina. State Practice Declaration, para. 17, Annex 4.

[161] In France, a detainee is assigned a social worker and provided consular information when he or she arrives at a detention facility. If the detainee wants consular notification, the social worker often makes the call to the Embassy. State Practice Declaration, para. 13, Annex 4.

[162] Nothing in Article 36, paragraph 1, purports on its face to alter, in any way, the municipal criminal procedures of the receiving State. The only connection to municipal criminal procedures is that the receiving State's obligations under subparagraph (b), and the sending State's rights in subparagraph (c), are triggered when a foreign national "is arrested or committed to prison or to custody pending trial or is detained in any other manner". VCCR, art. 36(1)(b), Annex 23, Exhibit 1. Once this triggering event occurs, the paragraph provides no further guidance regarding the timing of the information and notification obligations under subparagraph (b) relative to any investigative or prosecutorial actions that a receiving State may undertake. It merely provides that the receiving State must complete each of its obligations under that paragraph "without delay".

notification is conveyed and properly proceeds on an independent schedule. Thus, "without delay" cannot mean "before interrogation"[163].

6.23 This understanding of the plain meaning of "without delay" is confirmed if we consult a dictionary. The *Oxford English Dictionary* defines the noun "delay" as: "1.a. The action of delaying; the putting off or deferring of action, etc.; procrastination, loitering; waiting, lingering. b. The fact of being delayed or kept waiting for a time; hindrance to progress"[164]. Similarly, *Webster's Third New International Dictionary* defines "delay" as: "the act or practice of delaying;

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[163] The fact that the concept of without delay should have neither a mere temporal meaning nor one linked specifically to the carrying out of a government function is also illustrated by reference to Article 37, under which States Parties must: 1) "inform without delay" the sending State's consulate when one of its nationals dies in the territory of the receiving State; 2) "inform the competent consular post without delay" of any case where the appointment of a guardian or trustee appears to be in the interests of a national of the sending State; and 3) in the event of an accident involving a vessel or aircraft of the sending State, "inform without delay" the consular post nearest to the scene. Clearly, requiring these communications to be made "without delay" does not mean the receiving State would be required to suspend its activities regarding, for example, rescuing those who have survived an aircraft accident, until the relevant consulate has been informed. It can only mean that there should be no deliberate or unwarranted postponement in informing the consulate, even as the regular business of the receiving State goes on.

[164] *Oxford English Dictionary*, Vol. 4, p. 409 (1989) (hereinafter, this book will be referred to as "*OED*"), Annex 23, Exhibit 75. It defines the verb "delay" as: "1. To put off to a later time; to defer; postpone. 2. To impede the progress of, cause to linger or stand still; to retard, hinder. 3. To put off action; to linger, loiter, tarry". *Id.* It must be noted that the OED also offers a definition of the phrase "without delay" as meaning "without waiting, immediately, at once". *Id.* However, the context of this phrase in the VCCR, especially in relation to its other articles that use the term "immediately", makes clear that this OED definition of the phrase is not applicable here.

procrastination; lingering . . . "[165]. The *OED* defines the preposition "without" as: "10. With absence or lack of, or freedom from . . ."[166]. *Webster's* defines it as: "3. not using or being subjected to; exempt or free from; 4. not accompanied by or associated with . . ."[167]. Thus, "without delay" can be understood as the absence or lack of procrastination, deliberate inaction, lingering or putting off[168]. Delay is not simply

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[165] *Webster's Third New International Dictionary*, p. 595 (1981) (hereinafter, this book will be referred to as "*Webster's*"), Annex 23, Exhibit 76. It defines the verb "delay" as: "1. To put off; prolong the time of or before; postpone; defer. 2. To stop, detain, or hinder for a time; check the motion of, lessen the progress of, or slow the time of arrival of; to cause to be slower or to occur more slowly than normal; retard . . .". *Id.* The French text of Article 36(1)(b) uses the phrase *sans retard. Le Nouveau Petit Robert*, p. 465 (1995), Annex 23, Exhibit 77, defines *retard* as: "*action de retarder, de remettre à plus tard*" ("the act of delaying, of putting off until later"); "*sans retard*" is defined as: "*sans attendre, sans tarder; le plus vite possible*" ("without waiting, without delaying; as quickly as possible").

[166] *OED, Vol. 20, supra* note 164 at pp. 458-460.

[167] *Webster's, supra* note 165 at p. 2627.

[168] Whereas the phrase "without delay" is used consistently throughout Article 36(1)(b) in both the English and French language versions of the VCCR ("sans retard" in the French version), the Spanish language version surprisingly uses one formulation ("*sin dilación*") with respect to consular information, another formulation ("*sin retraso alguno*") with respect to consular notification, and yet a third ("*sin demora*") with respect to the forwarding of communications to an arrested person's consulate. Although "*dilación*", "*retraso*", and "*demora*" are terms that synonymously denote delay, *Diccionario Internacional: español/ingles*, p. 1109, 1143, and 1174 (1997), Annex 23, Exhibit 197, we point out that the Spanish language text frames the obligation to provide consular notification, if requested, "*sin retraso alguno*" ("without delay whatsoever"). We have no explanation for these differences and believe that they occurred during the course of the drafting of the Convention. Review of the two other authentic language versions of the VCCR only confirms this understanding, since both the Russian and Chinese texts employ the same term in translating "without delay" as it applies to consular information and notification obligations (the Chinese text apparently employs a different term in translating "without delay" with respect to the forwarding of communications, but this obligation is not at issue in this case). In any

measured in periods of time; it implies also the existence of intention or inattention that extends the time beyond what is necessary or normal.

6.24 Viewed in context, and in light of the object and purpose of the VCCR, the consular information provision can thus fairly be said to require the receiving State to provide the required consular information, while refraining from procrastination or from any deliberate inaction that postpones its completion. Nothing in the ordinary meaning of "without delay" links it to the carrying out of the interview or interrogation of an individual, or of a criminal investigation, or of other legal actions.

6.25 An examination of the entire text of Article 36(1) lends further support to the United States' interpretation and, likewise, reveals why Mexico's asserted definition is unsustainable. There is nothing in any part of subparagraph (1)(b) that links the provision of consular information to the criminal investigation. As noted, the phrase "without delay" appears three times in that subparagraph: first, in relation to notifying the consular post, upon request, of the detention; second, in relation to forwarding any communication from the detainee addressed to the consular post; and finally, in relation to informing the detainee that he may have his consular post notified and his communications forwarded. Each obligation must be performed "without delay". Mexico faces a heavy burden to show that the same phrase used repeatedly in the same clause is to be given different meanings but has failed to –

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event, although Mexico argues that "without delay" means "immediately", we see no evidence that this argument hinges upon Mexico's reliance on the apparently non-conforming Spanish language version because Mexico does not differentiate between the application of the phrase "without delay" to the two separate obligations – to provide consular information and, if requested, consular notification – arising under Article 36(1)(b).

and cannot – meet that burden[169]. Yet giving each usage the same meaning proposed by Mexico demonstrates that Mexico's definition is untenable because it leads to absurd results. By contrast, the definition suggested by the United States works in all relevant contexts.

6.26 The obligation, upon request of a detained foreign national, to notify the consulate of his or her arrest would normally be carried out in the ordinary course of business. One might pick up the phone or send a fax, but even at present (and certainly at the time the VCCR was concluded) it would not be unusual, particularly if an arrest occurred far from a consulate or embassy, to send a letter or a diplomatic note[170]. Notification through a face-to-face meeting might also be arranged[171]. The actual accomplishment of notification may depend on whether

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[169] This Court has found that the Party asserting that a term has a special meaning bears the burden of "demonstrat[ing] convincingly" the use of that term with that special meaning. *See Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 53, para. 116. *See also Fisheries Jurisdiction (Spain v. Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 508, para. 45 (Dissenting Opinion of Vice-President Weeramantry) (citing the "general principle of legal interpretation that clauses in a document must be treated not in isolation, but in the general context of the meaning and purport of the document in which they occur. Together they form an integral whole, and no one part may be compartmentalized and brought into exclusive operation at the expense of the other.").

[170] Notably, nothing in Article 36 indicates the manner in which consular officers are to be notified by receiving State officials of the desire of a detained foreign national for consular assistance. Thus, it is left to receiving State officials to use a variety of methods, including ones such as diplomatic note or regular mail that may result in notification occurring after critical events in a criminal investigation have occurred. However, Mexico's proposed interpretation of "without delay" necessarily would bar the provision of notice via mail or diplomatic note.

[171] One can imagine circumstances in which a State would conclude that the best way to notify a consular officer of an arrest would be in person (for example, if the arrest occurred in circumstances that would prove embarrassing to the sending State).

the means of conveying the request for consular notification are working (the mail, the telephone lines), or if the consular officer who must receive the notification is available (*e.g.*, on a long holiday weekend). In each case, however, notification would have been made "without delay". It will rarely, if ever, however, happen immediately.

6.27 The time period for carrying out the requirement to forward any communications from the detainee to the consulate is likewise imprecise and will vary with the circumstances[172]. It envisions an on-going obligation to forward communications to the consulate during the period of detention, which could last weeks, months, and even years. Mail may be picked up for delivery once a week, or once a day; or perhaps twice on weekdays and not at all on weekends. In the event of a labor dispute or natural disaster, the mail service might be disrupted for a period of time. In this context, "without delay" can only mean that performance should occur in the ordinary course of business, while refraining from procrastination or deliberate inaction. It certainly does not mean that all other work must stop so that every letter to the consulate can be dispatched immediately by hand-delivery.

6.28 There is no reason to think the phrase has a different meaning in reference to providing a detained person with

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[172] The requirement in Article 36(1)(b) that the competent authorities of the receiving State *forward* any communication addressed to the consular post by the person arrested, in prison, custody or detention "without delay", itself militates against Mexico's interpretation. Because the text provides no further guidance regarding the mechanism for forwarding a communication, a decision by local authorities in 1963 to forward communications via mail would clearly have constituted a good faith effort to comply with this requirement. This is not to say that States Parties in the 21st century should eschew cell phones, fax machines, couriers or e-mail. We highlight this provision solely because it provides further evidence that States Parties did not understand "without delay" to mean "immediately and prior to interrogation". *See supra* note 170.

consular information. Provision may be made for the information to be given by the arresting officer, by the booking officer, by the jailer, or by a magistrate at the initial court appearance; in each case it would be given "without delay" were it given within a reasonable period of time (the United States has promoted a standard of twenty-four to seventy-two hours as a rule of thumb) and in the ordinary course of business.

6.29 Likewise instructive is the fact that the texts of other articles within the VCCR show that when they intended to describe obligations that must be performed simply in terms of time, the drafters utilized a variety of different phrases. For example, Article 14 requires the receiving State to "*immediately notify*" the competent authorities as soon as the head of a consular post is admitted even provisionally to the exercise of his or her functions. But if "without delay" means "immediately", as Mexico argues, then what meaning is to be given to "immediately notify", which must have been intended to indicate an even shorter time period? Why, moreover, would the drafters have used different language to represent what Mexico contends is essentially the same concept?

6.30 In the important context of criminal proceedings, Article 41 provides that the receiving State must "*promptly notify* the head of the consular post" in the event of the arrest or detention of a member of the consular staff. If "without delay" is to be given the definition suggested by Mexico – "immediate and prior to interrogation" – then by implication the standard "promptly notify" would mean that the VCCR permitted less timely notification to a consulate of the arrest of a member of its own staff than it permitted for other citizens, such as tourists. This cannot have been the intention of the drafters[173].

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[173] Instead, the VCCR clearly sought to give consular officers more protections than non-officer nationals of the sending State. For example, Article 41(c) provides that when a consular officer is detained pending trial

6.31 If the drafters had intended "without delay" in the concluding clause of Article 36(1)(b) to mean "immediately and prior to any interrogation", they plainly would and could have specified this in the text, given the usage of the term "immediately" and other variations elsewhere in the VCCR. The fact that they did not shows that they in no way intended the meaning that Mexico now advances.

2. State Practice Confirms "Without Delay" Has the Meaning Given To It by the United States

6.32 Mexico has also failed to show that the practice of States under the VCCR establishes an agreement of the States Parties to give the phrase "without delay" the special meaning it proposes. In fact, Mexico points to no State practice except that of the United States, which it completely misrepresents, and its own, which it also portrays inaccurately. State practice – including Mexico's own practice – simply does not support Mexico's position. Rather, State practice is consistent with the view of the United States.

6.33 The United States has compiled a wealth of information on how States Parties to the VCCR carry out their obligations under Article 36(1)(b), including through a comprehensive survey of State practice[174]. This information shows that, of the seventy-nine countries about which we have information and that deal with United States citizen consular information and

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pursuant to a decision by the competent judicial authority for allegedly committing a grave crime, "the proceedings against him shall be instituted *with the minimum of delay*". VCCR, Annex 23, Exhibit 1. Article 63 states, *inter alia*, "[w]hen it has become necessary to detain an honorary consular officer, the proceedings against him shall be instituted *with the minimum of delay*". *Id.* There are no comparable provisions requiring that proceedings be instituted promptly against nationals of the sending State generally.

[174] *See* State Practice Declaration, Annex 4.

notification cases on the basis of the requirements of the VCCR and/or a consular convention requiring notification only upon the request of the detainee[175], only forty-five usually provide United States citizen detainees with consular information. Moreover, in twenty-seven of these forty-five countries the consular information is not provided immediately upon detention or before initial questioning by law enforcement authorities. Typically the information is provided only at some point during or after the initial interrogation; in an appreciable number of cases it is given even later. In Argentina, for example, a judge provides detainees with consular information at their preliminary hearing, which follows an *incommunicado* period of up to three days during which questioning is conducted. In ten other of the forty-five countries, the information may be given before or after interrogation; often it is only during interrogation that the receiving State becomes aware that it has a United States national in custody. Only in eight of the forty-five does it appear to be fairly standard practice to provide consular information (or the opportunity to call the consulate) prior to interrogation[176].

6.34 Compliance with the consular information requirement by the remaining thirty-four of the seventy-nine countries governed by the VCCR in dealing with United States nationals cannot be described as routine. These countries include, for

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[175] The United States has many bilateral treaties on consular relations that include different provisions intended to be more stringent than the VCCR in two respects: first, by requiring notification to the consular officer regardless of any request by the foreign national, and second, by requiring such notification within a set period of time, such as three days. *See* State Department Manual, *supra* note 73 at pp. 47-49, Annex 21. Because of this very material difference, the timeliness of consular notification given to United States consular officers in those countries may reflect the requirements of those treaties and therefore is relevant principally to highlight differences from the practice under the VCCR.

[176] *See* State Practice Declaration, paras. 16-20, Annex 4.

example, the Netherlands, where a detainee is first provided with consular information only when he or she is sent to a house of detention after an initial period of detention in a police station that may last up to sixteen days.

6.35 Of special note, Mexican authorities routinely interrogate detained United States nationals before they are given consular information. In many cases, it is only during or even after the interrogation that the Mexican law enforcement authorities become aware that the detainee is a United States citizen[177]. Importantly, in all of our consular districts except Nogales and Tijuana, Mexican law enforcement officials do not break off interrogation if a United States citizen asks to speak to the consulate. Contact with the consular officer in most Mexican districts is permitted only after the interrogation is completed.

6.36 Article 128, Section IV of Mexico's Federal Code of Criminal Procedure requires that the detention of a foreign citizen be communicated immediately to the sending State's diplomatic or consular mission, regardless of whether the sending State is one in which notification is mandatory despite the wishes of the detainee[178]. Passed into law in 1991, this provision may be intended to simplify and thereby ensure

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[177] Mexico apparently experiences difficulties similar to those faced by the United States in light of the frequency of dual nationality and the extensive connections many persons have on both sides of the United States-Mexico border. *See* State Practice Declaration, para. 45, Annex 4.

[178] "Si se tratare de un extranjero, la detención se comunicará de inmediato a la representación diplomática o consular que corresponda". ("In the case of an alien, the fact that he has been placed in custody shall be reported immediately to the appropriate diplomatic or consular mission"). Leyes y Códigos de México, Código Federal de Procedimientos Penales, art. 128.IV (1995), Annex 23, Exhibit 69. While Article 128.IV is a provision applicable only to federal authorities, more than half of the Mexican states also have provisions imposing a similar obligation on state authorities. *See* Richards Declaration, para. 5, Annex 6.

compliance by Mexico with its consular notification obligations, including those under VCCR Article 36(1), which it implements only imprecisely[179]. Significantly for present purposes, however, Article 128.IV does not incorporate the type of onerous requirements Mexico is asking the Court to impose on the United States, either in law or in practice. While the law provides for "immediate" notification, the consequences of notification for the criminal process in Mexico are not what Mexico argues they should be in the United States.

6.37 Even Article 128.IV's requirement of immediate notification of a foreign national's consulate does not guarantee that the consulate will be notified *prior to* interrogation[180]. It certainly does not guarantee that the consular officer would be able to intervene before the foreign national provides his or her initial statement, or that the administration of prosecutorial or judicial process in Mexico would be halted prior to interrogation and/or an initial declaration while United States consular authorities were given an opportunity to consult with a United States citizen detainee[181]. Moreover, Mexico's administration of consular notification is erratic and inconsistent, and appears nowhere to ensure suspended proceedings while an American detainee is permitted to speak to his or her consulate[182].

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[179] Specifically, Article 128, Section IV makes no provision for informing the detained foreign national that he may decline consular notification, thus depriving him of the opportunity to decide whether consular notification should be given. *See* Zamora Pierce Declaration, para. 24, Annex 5; Richards Declaration, para. 5, Annex 6. This omission may be due to the practical difficulty of ensuring precise, technical compliance with Article 36(1)(b). In any event, it confirms that informing the individual is not an end in itself, but rather a procedural device to further consular notification – a purpose that is achieved by actual notice, however it occurs.

[180] *See* Zamora Pierce Declaration, para. 24, Annex 5.

[181] *See id.*

[182] *See* State Practice Declaration, paras. 43-47, Annex 4.

6.38 With very few exceptions, our posts surveyed worldwide (including those in host countries with which we have bilateral treaties) could not identify any law, regulation or judicial decision in any receiving State that precludes questioning of a suspect before he or she has been given consular information or that in any way links the right to remain silent to consular information.

6.39 When we look to practice regarding notification to the consular officer, and then access by the officer to the detainee, we also find no link to interrogation. The majority (fifty-seven) of the eighty-four States in which the provision of consular notification to the United States is governed by the VCCR and on which we have information routinely notify United States consular officers within seventy-two hours of the detainee's request for notification. In none of these fifty-seven countries, nor in any of the remaining twenty-seven that do not routinely provide consular notification, is there any law, regulation or judicial precedent absolutely barring questioning of a detained foreign national until consular notification has been given[183].

6.40 With respect to access, in some States consular officers generally are not allowed to have access to detained foreign nationals during an initial period of detention and investigation[184]. In the vast majority of VCCR countries, however, consular access to detainees – by telephone or in person – is readily granted when requested. Nevertheless, it usually occurs only after at least initial questioning of the detainee. The reasons for this vary: permission from judicial or other officials may be required; consular officers may not learn of the detention for several days (or longer); the detainee may be in a remote location; or the consular officer's workload may

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[183] *See* State Practice Declaration, paras. 21-25, 30, Annex 4.
[184] *See, e.g., id.* at paras. 36-44, Annex 4.

not permit an immediate call or visit[185].

6.41 It is ironic for Mexico to contend that the "practice" of the United States in implementing Article 36(1)(b) supports its interpretation of "without delay"[186], given that it has brought this case. In any event, the United States, like the vast majority of States Parties, measures compliance with its Article 36 obligations against a standard of reasonableness under the specific circumstances (anticipating a period of between twenty-four and seventy-two hours as a rule of thumb), not by reference to the taking of specific steps in the criminal justice system. Domestically, we provide guidance that is plainly consistent with the meaning given that term here: "[T]here should be no deliberate delay, and notification [i.e., the provision of consular information to the individual] should occur as soon as reasonably possible under the circumstances"[187]. Overseas, we provide guidance to our consular officers that is consistent with that meaning[188]. The United States has never interpreted Article 36 to bar a United States citizen from being questioned in a legitimate criminal case until he or she has received consular information[189]. The United States encourages its consular

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[185] *Id.* at paras. 31-35, Annex 4.

[186] *See* Mexico Memorial, paras. 196-204.

[187] State Department Manual, *supra* note 73 at p. 20, Annex 21.

[188] *See* Secretary of State to all diplomatic and consular posts, 18 Jan. 2001, 2001 State 10160, Annex 22; 7 *Foreign Affairs Manual* 400, Annex 23, Exhibit 74, Mexico Memorial, Annex 28, A407. Mexico hides the significance of the 2001 cable as a definitive statement of United States practice with respect to assisting its nationals abroad. *See* Mexico Memorial, para. 185 n. 204.

[189] Mexico wrongly suggests, Mexico Memorial para. 197, that the current views of the United States were "adopted for purposes of the *LaGrand* litigation", and are inconsistent with its prior practice. *See* Mexico Memorial, para. 197. This is untrue. The United States took the position well before the *LaGrand* case, on the basis of careful consideration of the VCCR text, the practice of States, and its negotiating history, that there was no basis for the reading Mexico would give Article 36 or the remedy it

officers *as a matter of policy* to cultivate relationships with local officials to try to receive "immediate" notification when United States citizens are arrested, and to obtain consular access to United States citizen detainees as soon as possible[190]. But the United States directs its consular posts to make a diplomatic protest, including a request for an investigation and report on the possible breach of the VCCR, only if consular notification is not received within seventy-two hours of the arrest[191]. Mexico's Memorial refers the Court to the practice of no other

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seeks. *See* Compliance Declaration, para. 14, Annex 1. While the United States has always aggressively sought to protect its nationals, it has often acted on a basis of policy, not legal entitlement. Its past interchangeable use of words like "should immediately", "must promptly", and "must without delay" never gave these terms the meaning Mexico would give them or linked the obligations of Article 36 to the ordinary conduct of criminal investigations. In paragraphs 197-199, Mexico's Memorial misstates the significance of two statements made by State Department officials expressing concern about statements made by United States citizens to whom United States consular officers had not been given access. Close examination of the sources cited shows that these were in extreme situations, one involving a politically motivated detention and the other concerns about torture and severe mistreatment in Mexico. In neither case did the United States take the view that the VCCR barred the taking of statements before consular information, notice, or access. Indeed, in the case of the situation in Mexico, the State Department expressly recognized that its consular officers could not interfere with Mexico's criminal justice system, because to do so would infringe its sovereignty. *See infra* note 288.

[190] *See* 7 *Foreign Affairs Manual* 411.3, Annex 23, Exhibit 74; Mexico Memorial Annex 28, p. A410. There is a significant distinction between law and policy. Attempting to obtain consular access prior to the giving of statements in no way evidences a belief that Article 36 bars taking a statement before consular information is given, or notification and access provided. Mexico's consular officers seek to be notified of detentions of Mexican nationals even when notification is not required by the VCCR. *See* Compliance Declaration paras. 17, 41, Annex 1. The efforts of the United States aggressively to assist its nationals no more changes the meaning of Article 36 than do Mexico's.

[191] *See* Secretary of State to all diplomatic and consular posts, 18 Jan. 2001, 2001 State 10160, Annex 22, para. 6, Annex 22; 7 *Foreign Affairs Manual* 415.4-1, Annex 23, Exhibit 74; Mexico Memorial Annex 28, p. A417.

States Parties. The Court has no basis for concluding that any State Party to the VCCR – neither Mexico, nor the United States, nor any other State Party – has interpreted and applied the phrase "without delay" in the way Mexico asks the Court to do here.

6.42 Finally, it is important to recognize that many States, including the United States, have entered into bilateral consular agreements that also address the obligations of consular notification. These agreements provide greater, not lesser, protections than the VCCR by ensuring that States are informed when their nationals are detained regardless whether the detainee wishes notification to occur. Under many of the bilateral agreements to which the United States is a party – with nearly sixty other States – notification to the consular officers must occur within a set period of time, in some cases up to four days[192]. With only a few exceptions[193], the States Parties to

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[192] *See, e.g.*, Consular Convention, 1 June 1964, United States of America-Union of Soviet Socialist Republics, art. 1, 19 U.S.T. 5018, Annex 23, Exhibit 80, (applicable to Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyz Republic, Moldova, Russian Federation, Tajikistan, Turkmenistan, Ukraine and Uzbekistan) (consular notification shall take place "within one to three days from the time of arrest or detention, depending on conditions of communication"); Consular Convention, 7 July 1972, United States of America-Hungarian People's Republic, art. 41, 24 U.S.T. 1141, Annex 23, Exhibit 81, (mandatory notification "without delay and in any event within 3 days"); Consular Convention, 31 May 1972, United States of America-Polish People's Republic, art. 1, 24 U.S.T. 1231, Annex 23, Exhibit 82 (mandatory notification "within three days from the time of detention or arrest" in the case of non-resident citizens of the sending State); Consular Convention, 9 July 1973, United States of America-Czechoslovak Socialist Republic, art. 36, T.I.A.S. 11083, Annex 23, Exhibit 83 (mandatory notification "without delay . . . and not later than after three calendar days"); Consular Convention, 5 July 1972, United States of America-Socialist Republic of Romania, art. 22, 24 U.S.T. 1317, Annex 23, Exhibit 84 (notification to take place "without delay and, in any event, not later than after two days"); Consular Convention, 17 September 1980, United States of America-People's Republic of China, art. 35, 33 U.S.T.

these agreements are also parties to the VCCR. The bilateral agreements are intended to ensure that the notification of the consular officer actually occurs within a defined period of time; this demonstrates an understanding that completion of this process "without delay" pursuant to the VCCR could take more time than the bilateral agreements specify. Moreover, even when bilateral agreements require notification "immediately", parties to these agreements do not understand them to require notification before questioning[194]. Nor are these agreements implemented in a way that suggests they bar questioning of a detained foreign national until consular notification has been given[195].

6.43 Thus, State practice not only supports but, in fact, bolsters the conclusion that "without delay" can only be interpreted as performance in the ordinary course of business, while refraining from procrastination or deliberate inaction. It in no way provides a foundation on which to impose the

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2973, amended by exchange of notes, 33 U.S.T. 3048, Annex 23, Exhibit 85 (mandatory notification "immediately, but no later than within four days from the date of arrest or detention"); Consular Convention, 12 May 1988, United States of America-Republic of Tunisia, Senate treaty document no. 101-12, Annex 23, Exhibit 86 (mandatory notification "without delay", and "without delay" contemplates "that this notification will be made within three days following restriction on the freedom of nationals of the sending State, or in cases where the notification cannot be made within three days because of communications or other difficulties, as soon as possible thereafter").

[193] The exceptions are: Belize; Brunei; The Gambia; Sierra Leone; Singapore; and Zambia. The terms of the bilateral consular convention between Great Britain and the United States, Consular Convention, 6 June 1951,United States of America-United Kingdom of Great Britain and Northern Ireland, art. 16, 3 U.S.T. 3426, Annex 23, Exhibit 86, continue to apply between all six of these states and the United States, as a matter of State succession to treaty obligations. *See* State Department Manual, *supra* note 73 at pp. 47-49, Annex 21.

[194] *See* State Practice Declaration, para. 28 and n.5, Annex 4.

[195] *See* State Practice Declaration, para. 30, Annex 4.

extraordinary reading of "without delay" that Mexico advances in the face of the practice of more than 160 States that are today party to the VCCR.

3. States Have Not Accepted Mexico's Proposed Definition Because Resort to that Definition Leads to Absurd Results

6.44 Any serious consideration of Mexico's proposed definition quickly shows that – unlike the meaning given to "without delay" by the United States – it would lead to manifestly absurd results. For example, if we assume *arguendo* that "without delay" means "immediately *and* prior to any interrogation"[196] and implement that definition "literally" as Mexico demands, making it a genuine automatic rule that admits of no exceptions or qualifications[197], we would quickly find, by reference to a few of the fifty-four cases, that the public would have been seriously endangered. Six of the fifty-four cases involve the disappearance and subsequent murder of adolescents or children[198]. Under Mexico's rule, in some future case, the competent authorities might arrest a foreign national who would know the whereabouts of a possibly still-living child; they would provide consular information before any questioning occurred and, if the detainee requested consular notification, delay any interrogation until the relevant consulate was notified and a consular officer had visited the individual, arranged for assistance and could observe the interrogation. Perhaps Mexico would grant an exception to this hard rule where tender lives are at stake. But would interrogation be permitted in a case where the arrested individual might instead have information about the location of a large drug shipment

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[196] Mexico Memorial, para. 204 (emphasis added).

[197] *See* Mexico Memorial, para. 204.

[198] *See* #36 Leal Garcia, #38 Medellin Rojas, #39 Moreno Ramos, #41 Ramírez Cardenas, #51 Perez Gutierrez, #54 Reyes Camarena. *See* Cases Declaration, corresponding Appendices, Annex 2.

expected to arrive that day and soon to be for sale on street corners? In the case of the arrest of a person who may have knowledge of the location in an urban center of a bomb that has not yet exploded? What about an individual involved in mislabeling prescription drugs currently in commercial circulation containing toxic substances?

6.45 Leaving aside the dangerous implications that Mexico's rule has for public safety, it is clear that the criminal justice systems in the United States (and most other States Parties to the VCCR) would be seriously impeded if Mexico's interpretation were adopted. There are currently over 17 million foreign nationals living in the United States[199]. Of the 184 States that maintain consulates in the United States, thirty do not have a consulate outside of Washington D.C., and seventeen more do not have consulates other than on the eastern seaboard (typically in New York and connected with their Mission to the United Nations)[200]. Even if only some appreciable minority of the thousands of foreign nationals arrested every day in the United States were to request consular notification, interrogations of these individuals would have to be postponed until the competent United States authorities were able to locate a consular officer and that officer decided whether to communicate with the individual being detained – perhaps as far away from Washington D.C. as Hawaii or Alaska.

6.46 The consular officer could well decide, after some consideration, not to communicate with or assist the detained national. For it is important to remember always that Article 36 does not require consular officers to assist their nationals in

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[199] *See* United States Census Bureau, *The Foreign Born Population in the United States: (Table 1.1) Population by Sex, Age, and Citizenship Status*, Current Population Survey, PPL-135 (Mar. 2000).

[200] *See* United States Department of State, *Foreign Consular Offices in the United States*, Publication 10444, revised 8 Aug. 2003, *available at* http://www.state.gov/s/cpr/rls/fco.

detention either "without delay" or at all. Accordingly, United States authorities would be forced to postpone the interrogation of a capital murder suspect indefinitely while waiting for a consular officer to decide whether or not to visit or otherwise communicate with the detainee. Neither the detainee nor the United States would have any legal basis for compelling the consular officer to assist the foreign national and, under Mexico's inflexible rule, proceeding with the interrogation in the absence of a requested consular officer would result in a voided conviction and a new trial.

6.47 Finally, Mexico's interpretation would have the effect of prolonging detentions or making the orderly performance of consular functions impossible. A person may be arrested, detained, charged, and released on bail or other conditions all within a span of twenty-four to forty-eight hours. If immediate notification were required and all processes to cease pending arrival of the consular officer, this might well prolong the detention of the person. Alternatively, if processes were not to cease pending arrival of the consular officer, then those officers would be inundated with notices regarding persons who ultimately are only briefly in custody.

4. The Travaux Préparatoires *Support the Definition Given To "Without Delay" by the United States*

6.48 Customary international law, as reflected in Article 32 of the VCLT, provides that recourse to the *travaux* is had only where interpretation under the principles outlined in Article 31 "leaves the meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable"[201]. The United States submits that the phrase "without delay" plainly has the meaning given it by the United States, not that given to it by Mexico. Because the meaning of "without delay" is clear from

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[201] VCLT, art. 32, Annex 23, Exhibit 71.

the ordinary sense of those words in context, and is confirmed by State practice, resort to the *travaux* is unnecessary. Moreover, as interpreted by the United States, the phrase implies no absurd or unreasonable result that suggests a further need to consult the *travaux*.

6.49 We address the *travaux*, however, because Mexico has put them at issue. Mexico's claim that "[t]he *travaux préparatoires* confirm that the intent of the phrase 'without delay' was to require unqualified immediacy"[202] rests upon a highly selective reading of the *travaux* to conjure up a consensus that never existed. In fact, the *travaux* fail utterly to support Mexico's assertion that negotiators intended "without delay" to have the special meaning it proposes. Contrary to Mexico's hopeful assertion, the only conclusion that can be drawn "unqualified" from the *travaux* is that, as is so often the case in multilateral negotiations, there was a last minute agreement to use the words "without delay" in relation to the obligation to inform, but no clear consensus as to how this would be applied. Moreover, a full and fair examination also reveals why Mexico failed to provide any supporting citation to the *travaux* to bolster its proposition that "without delay" means "prior to interrogation"[203]. The *travaux* expressly contradict Mexico's position on the interrogation point. Indeed, it can be said with complete confidence that there is absolutely nothing in the record indicating that these two words were intended to be related to either the taking or the refraining from taking of specific acts by law enforcement authorities.

6.50 The text adopted by the ILC used the term "without undue delay" to accommodate those States whose domestic

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[202] Mexico Memorial, para. 179.

[203] Such a discussion is absent from Mexico's Memorial. *See* Mexico Memorial, paras. 183-84.

laws provided for a period of *incommunicado* detention[204]. When the conference of State representatives was convened to negotiate the convention based on the ILC text, however, several delegates expressed concern about the word "undue" because it might be interpreted as inviting delay[205]. At the same time, others were concerned that a requirement to notify "without delay" in every case would be impossible for them to implement[206].

6.51 The debate at the subsequent negotiating conference shifted to the possibility of defining "without delay" by adopting a specific time period for notification. But the delegations' proposals in this regard varied widely. German[207] and British[208] proposals respectively of one month and forty-

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[204] The International Law Commission's commentary to Article 36 states "[t]he expression 'without undue delay' used in paragraph 1(b) allows for cases where it is necessary to hold a person incommunicado for a certain period for the purposes of the criminal investigation". Draft articles on consular relations adopted by the International Law Commission at its thirteenth session, document A/CONF.25/6, in United Nations, *Conference on Consular Relations, Vol. II, Annexes: Proposals and amendments submitted in the Second Committee*, document A/CONF.25/16/Add.1, 1963, p. 24, para 6, Annex 23, Exhibit 90.

[205] *See, e.g.*, United Nations, *Conference on Consular Relations, Vol. I, Summary records of plenary meetings and the meetings of the First and Second Committees*, document A/CONF.25/16, 1963, p. 339-340, para. 20, Annex 23, Exhibit 7. ("There should be a clear obligation to inform the competent consul . . ., and to do so promptly. . . . That was why [the delegate from the United Kingdom] had proposed that the word 'undue' should be deleted; the wording of the draft implied that some delay was permissible".)

[206] *See supra* note 28.

[207] Federal Republic of Germany: amendments to article 36, document A/CONF.25/C.2/L.74, in United Nations, *Conference on Consular Relations, Vol. II, Annexes: Proposals and amendments submitted in the Second Committee*, document A/CONF.25/16/Add.1, 1963, p. 81, Annex 23, Exhibit 92.

[208] United Nations, *Conference on Consular Relations, Vol. I, Summary records of plenary meetings and the meetings of the First and Second*

eight hours demonstrated the widespread disagreement among delegations. The various delegations advocated that "without delay" should require notification within: forty-eight hours or less (United Kingdom)[209]; "shorter period, but perhaps longer than" forty-eight hours (Spain)[210]; ten days (Greece)[211]; "one or two weeks" (Morocco)[212]; less than one month (Tunisia)[213]; one month (South Korea)[214]; and "within one month would not be practicable" (Yugoslavia)[215]. The United Kingdom delegate had also been prepared to accept "a sentence to the effect that the obligation applied only where persons were detained for more than 48 hours" in order to address "the possibility of special problems, as in the case of neighbouring countries where people crossed the border frequently for work or pleasure . . . "[216]. No delegation proposed a specific time period of less than 48 hours, nor did any delegation reference the need to notify prior to interrogation by the authorities. Some delegations expressed reservations about stating a concrete time period for fear that authorities would routinely delay notification until the time period had run.

6.52 After every proposal had failed, and after Article 36 had been voted down in its entirety over this thorny issue, in the very final hours of the negotiating conference the impasse was resolved with agreement on the current text, which uses "without delay" in three places in paragraph (1)(b). But no

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Committees, document A/CONF.25/16, 1963, pp. 339-340, para. 20, Annex 23, Exhibit 7 ("The amendment by the Federal Republic of Germany would allow for too long a delay; if the Committee wished to allow some latitude the most he could accept would be about 48 hours.")

[209] *Id.* at p. 340, para. 20.

[210] *Id.* at p. 340, para. 27.

[211] *Id.* at p. 339, para. 15.

[212] *Id.* at p. 341, para. 35.

[213] *Id.* at p. 339, para. 28.

[214] *Id.* at p. 338, para. 11.

[215] *Id.* at p. 338, para. 10.

[216] *Id.* at p. 340, para. 21.

agreement was reached amongst the delegations as to what precisely this phrase meant. A farrago of views remained. None, however, supports Mexico's assertion of a link to interrogation. At best one can say that "without delay" was generally understood to be describing a period of time that would vary with the circumstances, but should not be extended by deliberate action or inaction. In light of this discussion, States Parties presumably found "without delay" to be acceptable because they assumed it would leave them a reasonable degree of discretion in application[217].

D. The United States Gives Full Effect To Article 36(1) and Provides the "Review and Reconsideration" Required Under Article 36(2) in Its Criminal Justice Systems and Through Executive Clemency Proceedings

6.53 Mexico also contends that the United States federal and state criminal justice systems do not give "full effect" to the "purposes for which the rights accorded under [Article 36] are intended"[218]. Mexico is wrong. We first examine the *LaGrand* judgment, which interpreted the obligations of receiving States under Article 36(2). We next address the four principal arguments that Mexico makes against the United States with respect to Article 36(2): (1) its assertion that "the United States has violated Article 36(2) by foreclosing legal challenges to convictions and death sentences" through the application of procedural default rules[219]; (2) its claim that executive clemency proceedings do not provide "uniform, fair or meaningful"

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[217] States have subsequently demonstrated this understanding in their practice, by implementing the obligation in a variety of ways. Yet even the broad range of practice does not include any significant effort to complete notification procedures before the interrogation of a detained foreign national. *See* State Practice Declaration, passim, Annex 4.

[218] VCCR, art. 36(2), Annex 23, Exhibit 1.

[219] *See* Mexico Memorial, heading for Chapter IV(B)(2).

review and reconsideration[220]; (3) its complaint that the "refusal [of United States courts] to recognize Article 36 rights as fundamental to due process for a foreign national . . . prevents the courts 'from attaching any legal significance'" to Article 36(1) breaches[221]; and (4) its invocation of the doctrine of effectiveness in arguing that "[u]nder international law, the United States is required to take whatever action is necessary to give effect to its treaty obligations"[222]. None of these arguments has merit.

1. The Implications of Article 36(2) and LaGrand *for the Laws and Regulations of the Receiving State*

6.54 In *LaGrand*, the Court stated that the application of "the procedural default rule [of the United States] prevented [the United States courts] from attaching any legal significance to the fact" of the breach of Article 36(1)[223]. The Court further stated that "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 [Article 36(1)(b)] are intended'"[224]. The Court found, however, that "[i]n itself, the rule does not violate Article 36"[225]. The breach occurred in its application – "by not permitting the review and reconsideration, in light of the rights set forth in the Convention, of the convictions and sentences . . . after the violations . . . [of Article 36(1)(b)] had been established"[226].

6.55 Significantly, when it announced its remedy in the

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[220] *See* Mexico Memorial, heading for Chapter IV(B)(3).
[221] *See* Mexico Memorial, paras. 238, 299-345.
[222] Mexico Memorial, para. 284; *See generally* Chapter IV(B)(4), paras. 283-298.
[223] *LaGrand, Judgment*, para. 91.
[224] *See LaGrand, Judgment*, para. 91.
[225] *LaGrand, Judgment*, para. 90.
[226] *LaGrand, Judgment*, para. 128(4).

dispositif, the Court did not say that review and reconsideration must be provided by the courts, even though the breach had arisen from judicial application of the procedural default rule. Rather, the Court held that, in the event of a breach of Article 36(1)(b), "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"[227]. This holding clearly confirmed what Article 36(2) expressly permits – that receiving States may establish laws and regulations of general applicability, without creating special laws and regulations for foreign nationals, so long as they ensure that the purposes of Article 36(1) are given full effect. As the first sentence of Article 36(2) requires, the precise contours of the process of review and reconsideration are left to the discretion of the receiving State.

6.56 Thus, as construed by the Court in *LaGrand*, Article 36(2) has two functions –basic function, and a remedial function. Its basic function is to make clear that the obligations established by Article 36(1) should be exercised in accordance with the laws and regulations of the receiving State – which laws can include those governing the criminal justice process, but such laws and regulations should "enable full effect to be given to the purposes" for which those obligations are undertaken[228]. Second, in the event that a breach of Article

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[227] *LaGrand, Judgment*, para. 128(7). The Court's order that the United States provide review and reconsideration "by means of its own choosing" was also significantly different from Germany's fourth submission, which asked for an assurance that "the United States will ensure in law and practice the effective exercise of the rights under Article 36" of the VCCR, *LaGrand, Judgment*, para. 117.

[228] *See* VCCR, Article 36(2), Annex 23, Exhibit 1 ("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

36(1)(b) has occurred and serious penalties have been imposed on a foreign national detainee, the receiving State should still give full effect to the purposes of Article 36(1)(b) by providing "review and reconsideration of the conviction and sentence"[229] in light of the violation, by means of its own choosing. These are two distinct functions, both arising under Article 36(2), that may overlap in their execution.

6.57 As will be explained, the laws and regulations of the United States fully comply with Article 36(2), including in cases in which breaches of Article 36(1)(b) have occurred. The United States provides "review and reconsideration" through the operation of the judicial process and the clemency process. These processes together give full effect to the purposes of the requirements of Article 36(1) and, in all cases, allow appropriate review and reconsideration of convictions and severe sentences imposed in cases where breaches of Article 36(1) may occur.

6.58 Mexico's focus on the remedial function of Article 36(2) ignores its more basic function, which is to emphasize the rights of the receiving State to conduct its own affairs in accordance with its own laws. The Court's holding in *LaGrand*, that procedural default rules of the receiving State are not automatically inconsistent with the obligations imposed by Article 36(2), respected this basic function. But Mexico conflates these functions, which must be considered separately and in their proper sequence: first, the basic function; and then the remedial one. Mexico has instead started with the remedial function and then attempted to recast the basic function of Article 36(2), finding in it affirmative obligations on the receiving State that do not in fact exist – making the tail wag the

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said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.")

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

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6.59 The principal purpose of Article 36(2) is not to mandate the enactment of specific laws and regulations, whether to enforce the requirements of Article 36(1) or to provide remedies for breaches of Article 36(1). It is quite the opposite. Article 36(2) recognizes the sovereign right of States to order their own affairs, and to implement their international obligations within the context of their own criminal justice systems, so long as these laws and regulations do not preclude giving full effect to the purposes of Article 36(1). Mexico elevates the proviso of Article 36(2) at the expense of the text to which the proviso is attached.

6.60 The proviso establishes no affirmative obligation to create laws or regulations; it instead provides a boundary on the discretion of the receiving State. Moreover, the proviso should be read and understood precisely – its requirement is that "full effect" must be given to the "purposes" of Article 36. It is not that laws and regulations must be adapted or changed in any particular way, or that they must give effect to purposes that are not intended by Article 36(1).

6.61 Thus careful attention must be given to the purposes of Article 36(1). We have previously discussed both the purposes for which these requirements are accorded, and the purposes, such as interference in an investigation, for which they are not accorded. The overarching purpose of Article 36(1) is clearly to protect against secret detention by ensuring the possibility of communication between the foreign national and his consular officer even though the foreign national is detained. Nowhere in Article 36(1), however, is the individual given a right to compel the sending State to assist him or to respond to his request on a timely basis. Thus the purpose of Article 36(1) cannot be to ensure that a foreign national receives consular assistance; it can only be to allow for its possibility. That

possibility is achieved once the foreign national has been provided consular information and makes no request for notification or the consular officer is aware in fact of the detention, regardless of how he becomes aware.

6.62 We now turn to demonstrating why Mexico's contentions are wrong. The United States criminal justice systems in fact do give full effect to Article 36(1), first through the normal judicial process and finally, when necessary, through executive clemency procedures.

2. The United States Criminal Justice Systems Give "Full Effect" to Article 36(1), and Provide Appropriate Remedies for Breaches, Through the Judicial Process

6.63 The first respect in which Mexico claims that the United States has breached Article 36(2) is by "foreclosing legal challenges to convictions and death sentences" through the application of procedural default rules[230]. Mexico is unwilling to accept the fact 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*.

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[230] *See* Mexico Memorial, heading of Chapter IV(B)(2).

6.64 In the first instance, the judicial system can deal with any claim arising from Article 36(1) if it is timely raised. Indeed, the United States affirmatively encourages judicial authorities to ensure that consular notification requirements have been complied with, and some states have placed the obligation of providing or confirming consular information on their magistrates[231]. If Article 36(1) is not fully complied with, trial courts can consider requests for extensions of time to permit consular notification or even assistance, if offered, or for other relief based on the breach. They will not automatically bar the use of a defendant's statements simply because the defendant was not provided with consular information on a timely basis, but they will bar the use of a statement if the foreign national gave it involuntarily or without understanding and waiving his "*Miranda*" rights. This approach cannot offend the remedial requirements of Article 36(2), given that the purposes of Article 36(1) do not include altering the normal course of law enforcement investigations or preventing the taking of statements.

6.65 In addition, the United States provides review and reconsideration through extensive appellate and collateral review of trials and sentencing hearings. In those cases where a VCCR breach is alleged at trial, appeal courts will review how the lower court handled that claim along with all others in the normal process of direct appeal and collateral review, in accordance with relevant municipal law[232]. In this way, review and reconsideration takes place in the normal course of appellate review of all asserted errors at trial. In cases in which

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[231] *See* State Practice Declaration, paras. 13, 17, Annex 4.

[232] In cases in which information about the possibility of consular assistance is provided prior to trial, any adverse consequences of delay may be addressed by the trial court in the course of disposing of pre-trial motions and would, however decided, be preserved for consideration on appeal and, ultimately, during the clemency process.

the defendant does not claim a VCCR breach during trial, however, procedural default rules will possibly preclude such claims on direct appeal or collateral review, unless the court finds there is cause for the default and prejudice as a result of the alleged breach. Procedural default rules, in and of themselves, do not breach Article 36(2). This Court so stated in *LaGrand*[233]. Indeed, such rules, in various forms, are common worldwide[234]. As will be demonstrated in Chapter VII.D, *infra*, the operation of United States procedural default rules have not had the effect of foreclosing the remedial purposes of Article 36(2) as to any of the fifty-four cases that are the subject of Mexico's Application[235].

6.66 Mexico nonetheless reargues the procedural default issue, seeking from the Court the square rejection of such rules that it declined to give in *LaGrand*. Indeed, in its submissions to the Court, Mexico requests that the Court go beyond *LaGrand* and declare "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, . . . as provided by Article 36 of the Vienna Convention"[236]. It apparently would have the Court make this declaration even in cases in which the breach was known well before trial but not raised; indeed, Mexico seems to suggest that there are no circumstances under which a claim can be defaulted – the judicial process must remain open to permit the claim to be raised when all

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[233] *See LaGrand, Judgment*, para. 90.

[234] *See* Weigend Declaration, paras. 15, 25, Annex 3.

[235] *See LaGrand, Judgment*, para. 91. Mexico incorrectly equates legal significance with judicial effect. The legal significance of a breach of an obligation by a government can be addressed not only by a court, but also by the executive branch of a government. Each can recognize the existence of a legal obligation and indicate an appropriate response.

[236] Mexico Memorial, para. 407.

proceedings are over, at the last minute, regardless of whether earlier opportunities were pursued. But Mexico does not explain why this Court should discard its earlier holding in *LaGrand.*

3. The United States Criminal Justice Systems Also Give "Full Effect" To Article 36(1) Through Executive Clemency Proceedings

6.67 Mexico argues that the United States cannot fulfill the remedial aspects of Article 36(2) through the clemency process because executive clemency proceedings do not provide "uniform, fair or meaningful" review and reconsideration[237]. Mexico is wrong. While the clemency procedures of the fifty states of the United States are not uniform (just as their judicial systems are not), these procedures are an integral part of the existing "laws and regulations" of the United States through which errors are addressed, and they provide an appropriate mechanism for review and reconsideration in cases where breaches of Article 36(1)(b) have occurred. Where judicial remedies have been exhausted and yet review and reconsideration has not taken place, the United States can nonetheless meet its obligations through the clemency process.

6.68 Clemency is defined as "[m]ercy or leniency . . . the power of the President or a governor to pardon a criminal or commute a criminal sentence"[238]. It is an executive prerogative with deep roots within the common law system[239], understood

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[237] *See* Mexico Memorial, heading for Chapter IV(B)(3).

[238] *Black's Law Dictionary*, p. 245 (1999), Annex 23, Exhibit 94.

[239] *See Schick v. Reed*, 419 U.S. 256, 260-266 (1974), Annex 23, Exhibit 95 (discussing English and American legal history of clemency power); *Herrera v. Collins*, 506 U.S. 390, 411-414 (1993), Annex 23, Exhibit 59 (same). *See also* Halsbury, *The Laws of England, Vol. VI*, p. 404 (1909), Annex 23, Exhibit 199; William Blackstone, *Commentaries on the Laws of England*, Vol 4, pp. *396-397 (1809), Annex 23, Exhibit 198.

historically both as a vehicle for leniency or mercy, and as a means to ensure fair and correct legal outcomes[240]. Clemency in the modern era has been viewed less as a means of grace and more as a part of the constitutional scheme for ensuring justice and fairness in the legal process. It recognizes that criminal justice systems require fail-safe mechanisms to deal with claims that were not, could not, or should not have been considered by the courts[241]. As the United States Supreme Court indicated, clemency functions effectively as "the historic remedy for preventing miscarriages of justice where judicial process has been exhausted"[242]. As one recent commentator noted, "clemency is uniquely positioned to correct legal error"[243]. It remains an important feature of common law systems worldwide, including both the federal government of the United

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[240] The United States Supreme Court has explained the purpose of clemency, and consistently reinforced the importance of it being a flexible remedy. *See Ex parte Grossman*, 267 U.S. 87, 120-121 (1925), Annex 23, Exhibit 96.

[241] The modern Supreme Court has explained the critical role that clemency plays in the United States: "It is an unalterable fact that our judicial system, like the human beings who administer it, is fallible. But history is replete with examples of wrongfully convicted persons who have been pardoned in the wake of after-discovered evidence establishing their innocence. . . . Recent authority confirms that over the past century clemency has been exercised frequently in capital cases in which demonstrations of 'actual innocence' have been made." *Herrera v. Collins*, 506 U.S. at 415, Annex 23, Exhibit 59 (citing M. Radelet, H. Bedau, & C. Putnam, *In Spite of Innocence,* pp. 282-356 (1992)). Professor Radelet has furnished an affidavit that appears as Annex 1 to the Mexican Memorial.

[242] *Herrera v. Collins*, 506 U.S. at 412, Annex 23, Exhibit 59.

[243] Michael Heise, "Mercy by the Numbers: An Empirical Analysis of Clemency and its Structure", in *Virginia Law Review*, Vol. 89, No. 2, 2003, Apr., p. 253 (hereinafter, this article will be referred to as "Heise, Mercy by the Numbers"), Annex 23, Exhibit 97. As the Supreme Court has recognized, "[a] Governor may commute a sentence at any time for any reason without reference to any standards". *Solem v. Helm*, 463 U.S. 277, 301 (1983). Annex 23, Exhibit 98.

States, as well as all states that permit capital sentences[244].

6.69 Mexico has suggested that, because clemency has sometimes been described as an act of grace, it is not a legal remedy[245]. This ignores the fact that each of the fifty-four defendants has a legal right to petition for clemency. No issue, including a claim of breach of the VCCR, is *a priori* excluded from that process[246]. It is the result of the process, not the availability of the process, that depends on the "grace" – or broad discretion – of the decision maker; the availability of the process is a right. Moreover, it is that broad discretion to grant clemency that allows the process to take account of any claim; for example, that broad discretion allowed Illinois Governor George Ryan to commute the sentences of three of the fifty-four Mexican nationals in this case based, at least in part, on their having allegedly not received consular information as required[247].

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[244] *See Herrera v. Collins*, 506 U.S. at 414, Annex 23, Exhibit 59; *see also* Heise, Mercy by the Numbers, *supra* note 243 at p. 255 & n.70, Annex 23, Exhibit 97 (collecting statutes). The President is granted clemency power alone under the Constitution to remit federal crimes, while state governors sometimes exercise this power alone, and sometimes in conjunction with a clemency board. *Id.* at pp. 254-255.

[245] Mexico Memorial, para. 245.

[246] Mexico erects a straw man by asserting that the United States claimed clemency is "exempt from procedural barriers that may prohibit consideration of an otherwise meritorious petition" and then references a case in which a clemency petition was rejected as untimely filed. *See* Mexico Memorial, para. 268. To be clear, the United States has argued that clemency is available to hear claims otherwise barred by procedural default in the courts. The United States has not and would not argue that states may not put reasonable deadlines and other administrative requirements on the filing of clemency petitions.

[247] On 11 Jan. 2003, then-Illinois Governor George Ryan commuted the sentences of #45 Caballero Hernandez, #46 Flores Urbán, and #47, Solache Romero. *See* Cases Declaration, Appendices 45, 46, 47, Annex 2. In announcing his decision to grant blanket clemency, Governor Ryan specifically referred to the "men on death row who were denied" consular

6.70 Mexico has also attempted to cast doubt on the fairness of the clemency process by characterizing it as politicized and by implying racial or ethnic bias[248]. Both points have very recently been discredited by a comprehensive and scholarly statistical analysis of clemency in the context of capital cases in the United States that Mexico fails to mention[249]. Mexico also disparages the role and function of appointed pardon boards[250], when this same study demonstrates that they "were more likely than governors to grant clemency"[251]. Mexico points to the

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information under the VCCR. He also referred to his conversation with Mexican President Vincente Fox, who expressed his deep concern for the VCCR breaches. *See also* Governor George Ryan, Address at Northwestern University School of Law, 11 Jan. 2003, *available at* http://www.law.northwestern.edu/depts/clinic/wrongful/RyanSpeech.htm.

[248] *See* Mexico Memorial, paras. 252-253, 270-274.

[249] *See* Heise, Mercy by the Numbers, *supra* note 243 at p. 284, Annex 23, Exhibit 97 ("[D]efendant race and ethnicity did not appear to inform clemency decisions. . . . I did not find that racial or ethnic minorities on death row were any less successful in obtaining clemency than their non-minority counterparts. My finding at the clemency stage comports with prior empirical studies of clemency yet conflicts with widely-held perceptions about the general influence of race in the death penalty context."); *id.* at p. 297 ("the fact that one long-assumed contributor to inconsistent and arbitrary clemency decisions – political factors – did not emerge as significant in this study remains important, especially insofar as the findings conflict with conventional wisdom and isolated incidents".); *see also* American Bar Association, *Clemency and Consequences: State governors and the impact of granting clemency to death row inmates*, 2002, July, p. 2, *available at* http://ww.abanet.org/crimjust/juvjus/ jdpclemeffect02.pdf, Annex 23, Exhibit 99 ("granting clemency does not result in low approval ratings or threaten success in a future election, *since nearly all governors who granted clemency received high approval ratings or were re-elected if they sought re-election or higher office*. . . . Opportunists will attack a governor's grant of clemency, since it may seem an easy target, but there is no evidence to support the assumption that granting clemency impacts public approval or success at election time.") (emphasis in original).

[250] *See* Mexico Memorial, paras. 252, 261-267.

[251] Heise, Mercy by the Numbers, *supra* note 243 at p. 299, Annex 23, Exhibit 97.

relatively small number of successful clemency petitions[252], ignoring the fact that this is entirely to be expected since courts do an increasingly effective job of themselves identifying and addressing the defects in convictions that in prior years might have supported the grant of clemency[253].

6.71 Mexico has wrongly suggested, both in its Memorial[254], and during its oral presentation at the provisional measures stage before this Court[255], that *LaGrand* somehow affirmatively precluded the use of clemency to satisfy the Court's requirement of review and reconsideration. Mexico cites this Court's judgment in *LaGrand* for the proposition that "the Arizona Pardons Board took into account the violation of [the LaGrand brothers'] consular rights"[256]. It then concludes that, because this Court later ordered a remedy in *LaGrand,* "the Court determined ... 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"[257]. This argument first misrepresents the facts of the *LaGrand* case and then misstates the Court's holding.

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[252] *See* Mexico Memorial, para. 253.

[253] *Cf.* Heise, Mercy by the Numbers, *supra* note 243 at p. 309, Annex 23, Exhibit 97 ("Does the dwindling number of successful clemency petitions reflect an ever-decreasing number of worthy clemency candidates or, rather, evolving perceptions about the appropriate use of clemency? Indeed, other actors in the death penalty process – notably, prosecutors, jurors, and judges – might effectively be performing some (but not all) of the functions that clemency is designed to perform when they consider aggravating and mitigating circumstances surrounding capital cases.").

[254] *See* Mexico Memorial, para. 246.

[255] *See* Oral Argument, *Avena and Other Mexican Nationals, (Mexico v. United States of America)*, CR 2003/3 (Babcock), p. 12.

[256] Mexico Memorial, para. 246 (citing *LaGrand, Judgment*, paras. 27, 31).

[257] Mexico Memorial, para. 246.

6.72 First, even if this Court was, as Mexico says, "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"[258], the Court could not have considered the sufficiency of the clemency process as a means of review and reconsideration. It is true that the clemency petitions of both brothers raised the Article 36 issue[259]. But the position of the United States in *LaGrand* was that no remedy beyond an apology was required for a breach of Article 36(1)(b), and that any further remedies were strictly political or diplomatic[260]. The question of clemency as a remedy was not in issue. Moreover, at the time of the clemency hearings, the facts relating to the alleged breach were not clearly established as between the United States and Germany. There continued to be great confusion about when the competent authorities knew that the brothers were German citizens and not United States citizens[261]. The United States Government had not yet even determined whether a breach had occurred and, for that reason, had not itself requested the Board's consideration of the issue[262].

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[258] Mexico Memorial, para. 246.

[259] Karl LaGrand's clemency petition was denied on 23 Feb. 1999. *See* Letter from Edward Leyva, Chairman of Arizona Board of Executive Clemency, to Jane Hull, Governor of Arizona, 23 Feb. 1999, Annex 23, Exhibit 100. The clemency petition of Walter LaGrand was considered and rejected on Mar. 2, 1999.

[260] *See LaGrand, Judgment*, para. 123.

[261] *See LaGrand* Report, p. 10, Annex 23, Exhibit 79.

[262] The United States was not able to bring the Article 36 issue to the attention of the Pardons Board in either case, since Germany had only brought the possibility of a breach to our attention on 22 Feb. 1999, Letter from Joschka Fischer, Foreign Minister of Federal Republic of Germany, to Madeleine K. Albright, Secretary of State of the United States of America, 22 Feb. 1999, Annex 23, Exhibit 101, and the United States was still investigating the matter at the time of the hearings the following week. *See LaGrand* Report, Annex 23, Exhibit 79.

6.73 More significantly, consideration of neither petition was informed by a statement by either this Court or any other as to the legal consequences of a breach of Article 36. Germany filed its request for provisional measures with this Court on 3 March 1999. This Court's judgment on the merits in *LaGrand* was not issued until 27 June 2001, more than two years later. Thus the best that can be said fairly is that the Pardons Board was aware of the Article 36 issue, as one issue among others, but had no reason to think that the issue had any legal consequence and was not persuaded that the issue in itself warranted clemency. More significantly, consideration of neither petition was informed by a statement by either this Court or any other as to the legal consequences of a breach of Article 36.

6.74 Thus, there is no basis for Mexico's claim that the Court concluded there "that clemency review alone did not constitute the required 'review and reconsideration'"[263]. This Court had not yet concluded that Article 36(2) required a mechanism for review and reconsideration when the LaGrands' clemency hearings were held, and had no reason to consider whether clemency could or could not provide such a mechanism. In short, there is absolutely nothing in *LaGrand* that can fairly be read to support Mexico's assertion that clemency inherently fails to meet the requirements for effective review and reconsideration of a failure of consular notification. The Court would have had no basis for drawing such a conclusion.

6.75 Finally, it cannot be ignored that Mexico has attempted to discredit the clemency processes of the fifty states of the United States, as a whole, in a way that is both reckless and offensive. Just as it has impugned the integrity of our courts, Mexico has attempted to portray the governors, the legislators, and other elected or appointed officials of the states that have created and operated the clemency machinery as careless and

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[263] Mexico Memorial, para. 246.

uninformed, or simply malevolent.

6.76 Mexico has attempted to do so by stitching together materials from newspapers, magazine articles, and other unpersuasive sources that focus their criticisms on the procedures or operations of particular clemency processes in particular cases. Mexico's argument proceeds from anecdotal evidence – that purported shortcomings of particular clemency processes in a small number of isolated cases establish an overall failure of all clemency processes. At most, the incidents confirm the imperfection of all human undertakings. It is always possible that a particular decision-maker in a particular clemency process will fall short, in some regard, in his or her performance. But it cannot be assumed, as Mexico asserts, that a particular member of a particular clemency board falls short because he fails to read clemency petitions "line for line"[264]. If that were the standard of competence, many public officials would fail. But such an incident, in a particular case, does not provide a record that would enable this Court to assess the entire process, much less condemn it.

6.77 The clemency processes of the fifty states are established under their constitutions and by their laws and regulations. The state legislatures that created these processes, and the governors and clemency boards that implement them, are properly established institutions under the internal laws of the United States. They, and the processes they oversee, are entitled to the presumption that they operate in good faith and on a regular basis according to municipal law, unless the

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[264] Compare Mexico Memorial, para. 266, with *Faulder v. Texas Board of Pardons and Paroles, et al.*, No. A 98 CA 801, Transcript of Evidentiary Hearing, 21-22 Dec. 1998, pp. 207-209, Annex 23, Exhibit 196. As the board member explained, he might quickly read through documents that were duplicates or that contained repetitive information.

contrary has been proved[265]. It would be entirely inappropriate for the Court to determine – on the basis of allegations from questionable sources about problems in a small number of clemency cases in a handful of jurisdictions – that, as Mexico asserts, "clemency procedures in *most executing states* . . . could not possibly provide meaningful review or reliable reconsideration"[266]. Mexico has not even attempted to prove such a broad accusation, nor could it. It invites the Court to reach conclusions about the clemency processes in jurisdictions that it has not even discussed in its Memorial.

6.78 The Court should not approve Mexico's unsustainable effort to tarnish the integrity and reputation of the officials of the fifty states of the United States on the basis of bald allegations and thin evidence. Moreover, even in respect of those particular cases Mexico has mentioned, the Court should find that these allegations are unsubstantiated and that Mexico has failed adequately to prove that the clemency processes operated in an inappropriate manner. The critical point is that clemency officials are not bound by principles of procedural default, finality, or other limitations on judicial review. They may consider any facts and circumstances that they deem appropriate and relevant, even if courts considered and rejected such facts as a basis for relief or if the person seeking clemency failed to raise them in a timely fashion. The exercise of that discretion is not presumptively flawed simply because a

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[265] This is the principle of *omnia rite acta praesummuntur*. *See Methanex Corp. v. United States, First Partial Award, 7 Aug. 2002*, NAFTA Chapter 11 Tribunal, para. 45, Annex 23, Exhibit 102, *available at* http://www.state.gov/documents/organization/12613.pdf; *see also* Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, p. 305 (1953), Annex 23, Exhibit 103; Patrick Daillier & Alain Pellet, *Droit International Public*, pp.431-32 (2002), Annex 23, Exhibit 104; Alwyn Freeman, *International Responsibility of States for Denial of Justice*, p. 74 (1970), Annex 23, Exhibit 105.

[266] Mexico Memorial, para. 248 (emphasis added).

clemency official may fail to read cover pages, duplicate documents, or the like with unwavering attention.

4. Article 36(2) Does Not Compel States Parties to Treat Article 36(1) as Creating Rights that are Fundamental to Due Process

6.79 Next, we address Mexico's complaint that the "refusal [of the United States courts] to recognize Article 36 rights as fundamental to due process for a foreign national . . . prevents the courts 'from attaching any legal significance'" to Article 36(1) breaches[267]. Mexico devotes considerable effort to arguing that consular notification and assistance are due process rights, even human rights[268]. Mexico does this in order to support its claim that Article 36(2) requires the United States courts to treat a breach of Article 36(1) as a fundamental due process violation, which in Mexico's view would necessitate the imposition of certain heightened remedies under both international law and United States law[269]. This Court elided any consideration of these arguments when they were made by Germany in *LaGrand*[270]. This Court should now reject them.

6.80 To take Mexico's human rights argument first, the VCCR is not (and, as will be explained below, was never intended to be) a human rights instrument. The VCRR is about consular relations between States, as clearly stated in its preamble[271]. Indeed, one looks in vain for the inclusion of

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[267] Mexico Memorial, para. 238; *see generally* Chapter V, paras. 299-345.
[268] Mexico Memorial, paras. 331-345.
[269] Mexico Memorial, paras. 331-345, 354.
[270] *LaGrand, Judgment*, paras. 78, 126.
[271] We note that the second preambular paragraph references the Purposes and Principles of the Charter of the United Nations, but makes no mention whatsoever of human rights. No reference was made to human rights in discussions of the preamble during the negotiations in the United Nations Conference on Consular Relations. It is particularly telling that Yugoslav representative, Mr. Bartos, made no reference to human rights in his

consular notification in any international or regional human rights document, such as the European Convention on Human Rights[272], and the United States was unable to find the VCCR included in any volume compiling human rights instruments[273]. The protections it provides are conferred on the basis of reciprocity, nationality, and function, and they inure only to

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intervention during discussions of the preamble in the First Committee of the U.N. Conference in 1963. United Nations, *Conference on Consular Relations, Vol. I, Summary records of plenary meetings and the meetings of the First and Second Committees,* document A/CONF.25/16, 1963, p. 248, Annex 23, Exhibit 7. As a member of the International Law Commission in 1960, Bartos had previously stated (all members of the Commission are expected to speak in their personal capacities as members of the Commission) that the newly introduced Article 30A addressing consular notification "was intended to safeguard human rights and the protection of those rights, particularly where the interests of justice were at stake, should prevail over purely national interests". 1960 *Yearbook of the International Law Commission*, Vol. I, Summary Records of the Twelfth Session, document A/CN.4/SER.A/1960 (534th Meeting, 6 May 1960), p. 46, para. 28, Annex 23, Exhibit 73. He did not reiterate his prior position on behalf of his government at the negotiations.

[272] European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 Nov. 1950, 213 U.N.T.S. 221, Annex 23, Exhibit 110. *See also* Charter of Fundamental Rights of the European Union, 2000 O.J. C 364/01, Annex 23, Exhibit 106; American Convention on Human Rights, 22 Nov. 1969, O.A.S. Treaty Series No. 36, at 1, 1144 U.N.T.S. 123, Annex 23, Exhibit 107; American Declaration of the Rights and Duties of Man, O.A.S. Off. Rec. OEA/Ser.L./V./I.4, rev. (1965), O.A.S. Res. XXX, Annex 23, Exhibit 108; African Charter on Human and Peoples' Rights, 27 June 1981, 21 I.L.M. 58 (1982), Organization of African Unity, document CAB/LEG/67/3 rev.5, Annex 23, Exhibit 109.

[273] *See, e.g.*, Human Rights: A Compilation of International Instruments, I, Universal Instruments, doc. ST/HR/1/Rev.6 (2002), Annex 23, Exhibit 111. Moreover, if the VCCR is properly characterized as a human rights instrument, so too must be any other international agreement giving rights to an individual, such as the Convention for the Unification of Certain Rules Relating to International Carriage by Air, 12 Oct. 1929, 137 L.N.T.S. 11, commonly referred to as the "Warsaw Convention", Annex 23, Exhibit 112.

nationals of States Parties[274]. They are not applicable *erga omnes*. They are not enjoyed by all human beings simply by virtue of their human existence – the standard definition of a human right[275]. For these reasons, it cannot be said that informing a detained person that he or she may have a consular official notified of his or her arrest is a "human right." Mexico has provided no evidence to the contrary. Its position on this distorts the nature of the requirements of Article 36(1)(b) and trivializes the concept of a human right.

6.81 Mexico hinges its argument, though, on the fallacy that the requirements of Article 36(1)(b) are fundamental to due process, claiming that consular notification is "an essential requirement for fair criminal proceedings against foreign nationals"[276]. It implies that this Court, in interpreting the VCCR, has a mandate to determine what a State's criminal justice system must regard as "due process" rights or as "fundamental" rights, thereby taking on the role for the United States that the United States courts have long assumed in making these determinations under the "due process" clauses of the United States Constitution. Moreover, to lend credence to its argument, which persistently overstates the purposes and the importance of Article 36(1)(b), Mexico denigrates the United States criminal justice systems, making the reckless and

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[274] The VCCR would not apply to stateless persons, nor to persons whose sending State has no consular relationship with the receiving State.

[275] *See* Martha C. Nussbaum, "Capabilities, Human Rights, and the Universal Declaration", in *The Future of International Human Rights*, p. 26 (B.H. Weston & S.P. Marks, eds., 1999), Annex 23, Exhibit 113 (citing *Common Sense, The Rights of Man and Other Essential Writings of Thomas Paine* pp. 186-190 (Sidney Hook ed., 1994) (1792)); Rubén Hernández & Gerardo Trejos, *La Tutela de los Derechos Humanos*, pp. 12-13 (1977), Annex 23, Exhibit 114.

[276] Mexico Memorial, para. 308; *see also, e.g., id.* at para. 317 ("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.").

inaccurate assertion that, in the United States, "foreign nationals – and Mexican nationals in particular – are frequently subject to discriminatory treatment as a consequence of their race and immigrant status . . . in the courtrooms, jails, and lawyers offices . . ."[277]. Mexico's not-so-subtle implication, here and throughout its argument, is that United States courts do not (and cannot be trusted to) provide fair trials in *any* case in which the defendant is a foreign national. This is a profoundly offensive argument. The United States Constitution guarantees all those who stand accused a fair trial, regardless of nationality[278]. The Constitution's substantive and procedural safeguards, and especially the legal assistance provided to indigents in the United States, exceed every international standard for fairness and justice. Thus, it simply does not follow, as Mexico would have it, that a breach of Article 36 leads ineluctably to an unfair trial in the United States.

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[277] Mexico Memorial, para. 313; *see also, e.g., id.* at para. 320 (claiming that United States procedural protections "are often inadequate to apprise foreign nationals of their rights").

[278] As United States Supreme Court Justice Hugo Black observed over sixty years ago:

> Under our constitutional system, courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement. Due process of law, preserved *for all* by our Constitution, commands that no [prosecution tainted by racial or other bias] shall send any accused to his death. No higher duty, no more solemn responsibility, rests upon this Court, than that of translating into living law and maintaining this constitutional shield deliberately planned and inscribed for the benefit of every human being subject to our Constitution – of whatever race, creed or persuasion.

Chambers v. Florida, 309 U.S. 227, 241 (1940) (emphasis added), Annex 23, Exhibit 115.

6.82 Leaving aside Mexico's highly inappropriate request that the Court condemn the entire criminal justice system of the United States, or that it redefine the concept of "due process" in the criminal justice system of the United States, it is not the case that the requirements of Article 36(1)(b) are fundamental to the fairness of a criminal trial, whether as aspects of due process or otherwise. As Professor Weigend explains, Article 36(1) establishes procedural rights, not substantive rights, and the procedural rights it establishes are at best tangential to the criminal process. They do not necessarily attach to the criminal process at all: if a foreign national is charged and tried without being arrested or otherwise detained, there is no obligation to inform him of the possibility of consular notification. Accordingly, national criminal justice systems do not accord the obligations of providing consular information and notification the status Mexico claims they have[279]. Thus it is wrong to suggest that the "laws and regulations" of the United States must give Article 36(1)(b) the status of a constitutional protection in order to comply with the proviso of Article 36(2). Asking an individual, "would you like us to notify your consular officer?", as Article 36 provides, is totally unlike asking a suspect whether he would like a lawyer, which is the suspect's (and the accused's) fundamental right. In that case, if the answer is "yes", in the United States questioning must cease until the defendant has had the opportunity to consult with a lawyer, and a lawyer must be provided at state expense if the suspect does not have the financial means to hire one. But a "yes" to consular information triggers nothing beyond the obligation to notify.

6.83 Mexico consistently confuses the requirements of consular information and notification, which are all that Article 36(1)(b) protects, with the right of the sending State to provide consular assistance under Article 36(1)(c). And it persistently

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[279] *See* Weigend Declaration, para. 9, Annex 3.

ignores the fact that consular assistance, by the VCCR's own terms, is discretionary (both as to the State and its national). Consular officers have no international legal duty to respond to the request of the defendant, and the ability of all governments to provide assistance to their nationals abroad is limited by resource constraints, if nothing else[280]. Further, to rely on consular assistance as essential to ensure due process for foreign nationals in criminal proceedings is contrary to, and would undermine, the clear obligation of all States to provide due process. Fair trial and due process rights guarantees do not, cannot, and should not depend on the consular intervention of other States in order to be redeemed. Thus, it cannot be accepted, as Mexico would have it, that a foreign national under no circumstances can receive a fair trial in the absence of consular assistance.

6.84 With the exception of an advisory opinion of the Inter-American Court of Human Rights in an advisory proceeding initiated by Mexico[281] – a decision which has attracted no

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[280] The implication of Mexico's argument must be that States have an international obligation to provide consular assistance and that the failure of a State to so provide constitutes a breach of that international obligation. If that were true, most States would be in breach.

[281] *See* I/A Court H.R., *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 Oct. 1, 1999. Series A No. 16, paras. 122, 124, Annex 23, Exhibit 116. The Inter-American Commission on Human Rights has followed this opinion. *See* Inter-American Commission on Human Rights, *Ramón Martinez Villareal v. United States, Merits,* Case No. 11.753, Report No. 52/02, 10 Oct. 2002, *available at* http://www.cidh.org/annualrep/2002eng/USA.11753.htm, Annex 23, Exhibit 93. The OC-16 decision addresses issues outside the jurisdiction of the Inter-American Court, which plainly is not the appropriate body to interpret the VCCR. *See* Shabtai Rosenne, "The Perplexities of Modern International Law: General Course on Public International Law" in *Recueil Des Cours*, Vol. 291, pp. 128-129, Annex 23, Exhibit 117 (stating that this advisory opinion by the Inter-American Court of Human Rights is "open to criticism, and may possibly not give adequate recognition to the status of the ICJ as the

support from any other national or international court[282] – consular notification has never been understood by the international community to be an essential element of due process and fair trial protections.

6.85 Mexico's efforts to prove the contrary are, on close examination, utterly unsupported[283], forcing it to attempt to

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principal judicial organ of the United Nations". Furthermore, "[a] regional court or tribunal of limited jurisdiction, both *ratione personae* and *ratione materiae*, should show the greatest restraint before embarking upon the hazardous and delicate task of interpreting the application of a universal instrument adopted under the auspices of the United Nations, and which itself provides for the jurisdiction of the ICJ"). The principled opposition of the United States to demands for remedies for Article 36 breaches such as Mexico made to the Inter-American Court, and now makes here, prompted the United States to take the exceptional step of appearing before that court in OC-16, notwithstanding this jurisdictional limitation and the fact that the United States is not a party to that court's statute. The United States has clearly and consistently expressed its disagreement with that court's decision, which is infected with the same errors of reasoning that Mexico makes in this case.

[282] The decision is, in fact, flatly contrary to the views of a number of national courts, as will be explained below. *See also* Luisa Vierucci, "La tutela di diritti individuali in base alla Convenzione di Vienna sulle relazioni consolari: in margine al caso *LaGrand*" ("The Protection of Individual Rights under the Vienna Convention on Consular Relations, with Reference to the *LaGrand* Case"), in *Rivista di Diritto Internazionale*, Vol. 84, 2001, p. 707, Annex 23, Exhibit 118 (" . . . i diritti enunciati all'art. 36 costituiscono dei diritti dell'individuo-straniero, mentre non sono configurabili quail diritti dell'uomo") (" . . . the rights set forth in Article 36 are rights of the alien individual, but cannot be interpreted as human rights".).

[283] It falls upon Mexico, since it is arguing the existence of "international recognition of consular notification as an element of fundamental due process and a human right", Mexico Memorial, para. 345, to "prove that this custom is established in such a manner that it has become binding on" the United States. *See Asylum, Judgment, I.C.J. Reports 1950*, p. 276, in which the Court held that Colombia could not invoke "American international law in general" or regional customary law, without establishing "a constant and uniform usage practiced by the States in question". This Mexico has not done and cannot do.

construct support for its argument from whole cloth. Mexico takes as its warp a number of international texts, some conventions and some merely political or hortatory statements, that in all cases fail to establish consular notification as a fundamental due process right[284]. It takes as its woof an amalgam – a few scholarly articles, some random comments of persons speaking in their individual capacities at international gatherings, *amici* briefs that members of Mexico's current legal team filed in OC-16, as well as the public positions of a handful of States. With these thin threads Mexico attempts to weave the argument that customary international law "confirms" that consular notification has been generally recognized as fundamental to due process. But it has not been.

6.86 Mexico has not made even the beginnings of a credible showing that State practice reflects any recognition, much less significant recognition, of consular notification and assistance as essential elements of due process. In fact, Mexico has pointed to no State that considers Article 36(1)(b) as fundamental to due process and to no State that provides the remedies Mexico seeks. Moreover, it is not even the general practice of States to provide such remedies on an automatic basis with respect to rights that are more central to their

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[284] Mexico overstates the significance of the fact that a number of conventions on international crimes, including the 1984 United States Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, expressly note the rights provided for by Article 36 of the VCCR. *See* Mexican Memorial, paras. 333-334 and n.397. These conventions simply reiterate the Article 36 requirements with a view toward enhancing awareness and respect for them. The mere inclusion of such provisions does not, as Mexico would have it, "confirm that the right to consular notification under Article 36(1) is an essential element of due process." None of the conventions supports that conclusion.

criminal justice systems[285].

6.87 This is certainly true of the United States. As the Court is aware, United States courts do not require automatic exclusion of statements from use in evidence for a breach of Article 36(1)(b)[286]. Nor do United States courts require the *vacatur* of a conviction or sentence in those circumstances. This is because United States courts follow the general rule that such remedies are rarely granted, and then only for constitutional violations or when explicitly mandated by statute.

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[285] *See* Weigend Declaration, paras. 5(b), 17-19, 24-29, Annex 3. The United States does not concede that exclusion and *vacatur* would be the appropriate remedies for a breach of Article 36(1)(b) rights as Mexico advocates even if they were found to be fundamental to due process. The United States also does not concede that the content of the rights described at paragraphs 305-330 of Mexico's Memorial are correctly described. We discuss these issues in detail *infra* at Chapter VIII.A.4.

[286] As Mexico points out, "[t]he 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 [for violations of Article 36 of] the Convention". Mexico Memorial, para. 133. Mexico is correct. *See, e.g.*, the federal cases cited in Mexico's Memorial, para. 133 n.137. There appears to be only one lower court case in the United States that suppressed a statement as a remedy for a violation of Article 36, *State v. Reyes*, 740 A.2d 7 (Superior Court of Delaware 1999), and it is inapposite, Annex 23, Exhibit 119. The court found prejudice; it did not create an exclusionary rule. *Id.* at p. 14. In addition, it relied heavily on a decision of the United States Court of Appeals for the Ninth Circuit, *id.* at pp. 12-13, that was later overruled by the Ninth Circuit in an *en banc* decision. *See United States v. Lombera-Camorlinga*, 206 F.3d 882 (9th Cir. 2000) (*en banc*), *overruling* 170 F.3d 1241 (9th Cir. 1999), Annex 23, Exhibit 120. In *Valdez v. State*, the Oklahoma Court of Criminal Appeals remanded a case for resentencing upon finding a reasonable probability that the jury might not have imposed the death penalty had defendant had the benefit of adequate legal representation, which should have resulted in a background investigation that found the evidence bearing on his mental status at the time of the crime that was later found by consular officers. 46 P.3d 703, 710-711 (Okla. Crim. App. 2002), Annex 23, Exhibit 58.

They do not consider Article 36(1)(b) as fundamental to due process[287]. Consistent with this practice, the United States does not insist upon such remedies for United States citizens abroad for the mere failure to follow the procedures set forth in Article 36.

6.88 This result is also true, however, of Mexico. The United States is aware of no instance in which Mexican courts have vacated a criminal verdict to remedy a breach of Article 36(1)(b), and Mexico has referred the Court to no such case. Indeed, in 1976, the United States and Mexico entered into a prisoner transfer agreement with the conscious understanding that United States prisoners in Mexico, with respect to whom Article 36(1)(b) had not been honored and who were transferred to the United States, would have their Mexican sentence enforced by the United States, regardless of the breach[288].

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[287] *See* Weigend Declaration, para. 9, Annex 3. Even if the United States did consider Article 36 as fundamental to due process, it would not follow that the remedies Mexico seeks would apply, either under international law or United States law.

[288] *See* Treaty on the Execution of Penal Sentences, *supra* note 67, Annex 23, Exhibit 72. Mexico has made highly selective references to testimony by the Department of State before Congress in relation to this treaty that do not accurately convey the context and relevance of those hearings to the case before the Court today. The treaty was first proposed in a letter from Foreign Minister Alfonso Garcia Robles to Secretary of State Henry A. Kissinger in response to a letter from the Secretary regarding conditions for Americans in Mexican prisons. Letter from Henry A. Kissinger, Secretary of State of the United States of America, to Alfonso Garcia Robles, Foreign Minister of Mexico, 16 Feb. 1976; Letter from Alfonso Garcia Robles, Foreign Minister of Mexico, to Henry A. Kissinger, Secretary of State of the United States of America, 25 Mar. 1976, Annex 23, Exhibit 121. There had been accusations of torture and physical abuse, of forced confessions made in Spanish without the assistance of an interpreter, of denial of access to legal counsel, of lengthy pre-trial detention, of the absence of interpreters during court proceedings, of lack of access to information helpful to the defense, and of widespread extortion and beatings of United States citizens while in prison in Mexico. *See* 123 Cong. Rec. 19855 (1977) (testimony of

Mexico insisted on this understanding. If Mexico in the intervening years had truly believed that Article 36(1)(b) created fundamental rights, one might expect that Mexico would have established a domestic program enforcing its VCCR obligations by requiring the stringent application of the remedies it advocates in this case. Instead, it appears that, even as of today, Mexico has not implemented such a program.

Rep. Fortney H. Stark, Jr.), Annex 23, Exhibit 122; 123 Cong. Rec. 35017 (1977) (statement of Rep. Joshua Eilberg, Annex 23, Exhibit 123. *See also* U.S. Citizens Imprisoned in Mexico: Hearing Before the Subcomm. on Int'l Political and Military Affairs of the House Comm. on Int'l Relations, Part II, 94th Cong. pp. 38-41 (1976) (statement of Rep. Benjamin A. Gilman), Annex 23, Exhibit 124. In addition, there were significant problems regarding consular access and notification. In fact, Congressman Gilman specifically testified that "many prisoners complained that the American Embassy was not notified and was not allowed access to [United States citizens in prison in Mexico] for many weeks subsequent to their arrest." *Id.* at p. 40. Congressman Gilman went on to note that out of the thirty-five cases, which had arisen during the "period from October 1975 to December 1975, only on 2 occasions was the Embassy notified by the Mexican Government of the arrest of a [United States citizen]". *Id.* In his letter proposing the negotiation, Minister Robles noted: "With respect to aliens, agents of the Office of the Attorney General have categorical instructions to inform the consul concerned of any arrest as soon as it is made. We cannot, however, expect that irregularities will not occasionally be committed, especially when arrests occur in remote parts of the country. In such cases the competent authorities will take all necessary measures to correct the irregularities". Letter from Alfonso Garcia Robles, Foreign Minister of Mexico, to Henry A. Kissinger, Secretary of State of the United States of America, 25 Mar. 1976, Annex 23, Exhibit 121. The Article 36 breaches were not, however, understood to be a basis for not enforcing the Mexican sentences. *See* U.S. Citizens Imprisoned in Mexico: Hearing Before the Subcomm. on Int'l Political and Military Affairs of the House Comm. on Int'l Relations, Part I, 94th Cong., 16 (1976) (statement of Hon. Leonard Walentynowicz, United States Department of State), Annex 23, Exhibit 125 ("it must be kept in mind that . . . any time a foreigner enters another country, he becomes subject to that country's laws and procedures. Thus, if an American enters Mexico and commits a crime there, he is subject to arrest by Mexican authorities, to trial before Mexican courts and, if convicted, to imprisonment in a Mexican prison.").

6.89 Article 128, Section IV of Mexico's Federal Code of Criminal Procedure requires that the detention of a foreign national be communicated immediately to the sending State's diplomatic or consular mission[289]. Mexican law, however, provides no judicial remedy for the failure by Mexican authorities to comply with Article 128.IV, or otherwise to provide notice to detained foreign nationals of VCCR requirements[290]. Mexican law does not require the exclusion of evidence, the *vacatur* of conviction or the remittal of sentence for failure to provide notification under Article 128.IV or the VCCR[291]. In addition, there is no evidence that Mexican courts are willing to provide such remedies. To the contrary, the Declaration of Alexander Richards, the United States consular agent in Acapulco, Mexico, set forth in Annex 6 notes the experiences of Mexican attorneys representing American nationals detained in Mexico[292]. Not one of the attorneys surveyed considered the request of a Mexican court for the exclusion of evidence or *vacatur* of conviction or remittal of sentence in these circumstances to be a cognizable claim[293]. Moreover, the Declarations of Dr. Jesús Zamora Pierce, set

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[289] "Si se tratare de un extranjero, la detención se comunicará de inmediato a la representación diplomática o consular que corresponda". ("In the case of an alien, the fact that he has been placed in custody shall be reported immediately to the appropriate diplomatic or consular mission"). Leyes y Codigos de Mexico, Código Federal de Procedimientos Penales, art. 128.IV (1995), Annex 23, Exhibit 69. While Article 128.IV is a provision applicable only to federal authorities, more than half of the Mexican states also have provisions imposing a similar obligation on state authorities. *See* Richards Declaration, para. 5, Annex 6.

[290] *See* Zamora Pierce Declaration, para. 27, Annex .

[291] *See* Zamora Pierce Declaration, para. 25, Annex 5; Richards Declaration, para. 13, Annex 6.

[292] *See* Richards Declaration, paras. 7-11, Annex 6.

[293] *Id.* at para. 8. This understanding is further confirmed by the fact that one of the attorneys surveyed endeavored to raise the claim only to have it expressly rejected by a Mexican court. *Id.* at para. 10.

forth in Annex 5, the current President of the Mexican Academy of Criminal Sciences and former President of the Mexican Bar Association, and of Mr. Richards, note that neither was able to identify a single case in which a Mexican court applied the sort of automatic remedies that Mexico asks this Court to apply against the United States[294]. Thus, Mexico's own legal system has not been able to meet the legal standard it seeks to have imposed on the United States, and Mexico in its own practice does not treat Article 36(1) rights as fundamental to due process.

6.90 When we look beyond the practice of the United States and Mexico, we see that the few reported national court decisions that deal with alleged failures to advise a foreign national of consular information are squarely at odds with Mexico's position[295]. In no case has a court described or treated Article 36(1)(b) as fundamental to due process.

6.91 Particularly instructive is the first decision we are aware of in Germany since this Court issued its decision in *LaGrand*. In November 2001, the German Federal Supreme Court rejected the view that Article 36(1)(b) of the VCCR created fundamental due process rights[296]. In that case, a foreign national defendant raised on appeal the fact that he had not been given consular information when the police interrogated him (presumably claiming that a confession he had made to the police was therefore not admissible as evidence). The German court rejected the appeal, holding that the purpose of Article 36(1)(b) was limited to preventing nationals of the sending State from disappearing from the public view without a trace; its rationale

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[294] *See* Zamora Pierce Declaration, para. 25, Annex 5; Richards Declaration, para. 13, Annex 6.

[295] The cases discussed are those the United States has located to date. There may be other decisions on point that we have not found.

[296] *See* BGH 5 StR 116/0 decided on 7 Nov. 2001, *available at* http://www.bundesgerichtshof.de, Annex 23, Exhibit 126.

was not to protect a suspect from making uncounseled or incriminating statements.

6.92 Similarly, in the October 2001 Canadian case of *R. v. Partak*[297], two policemen picked up Mr. Partak, a United States citizen who was charged with murder, based upon a mug shot form. He volunteered a confession that he reiterated after being apprised of his right to counsel. He made further inculpatory statements to the investigating officers who interrogated him. When he later tried to block use of his statements at his trial based on the ground that he had not been given Article 36(1)(b) consular information, the court found that Mr. Partak's confession was voluntary, despite the "oversight" in failing to give Mr. Partak consular information[298]. The court also declined to use its common law power to exclude the confessions, despite the claim that their admission would adversely affect the fairness of the defendant's trial. The court thus concluded that Mr. Partak "failed to adduce any evidence that would support a finding that the failure of the police to advise him of his rights to have a consulate notified prejudiced him in any way"[299].

6.93 In the pre-*LaGrand* Canadian case of *Canada v. Van Bergen*, the Court of Appeal of Alberta rejected the petition of Mr. Van Bergen, who had fled to Canada, that he not be extradited to the United States because Article 36(1)(b) was breached by the United States when he was arrested in the State

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[297] [2001] 160 C.C.C. (3d) 553, Annex 23, Exhibit 127.

[298] *R. v. Partak*, [2001] 160 C.C.C. (3d) 553, 570, Annex 23, Exhibit 127. The court also rejected Mr. Partak's argument that the lack of consular notification constituted a violation or quasi-violation of section 10(b) of the Canadian Charter of Rights and Freedoms ("the Charter"), which provides that "Everyone has the right on arrest or detention . . . (b) to retain and instruct counsel without delay and to be informed of that right". *Id.* at pp. 567-569.

[299] *R. v. Partak*, [2001] 160 C.C.C. (3d) at p. 570.Annex 23, Exhibit 127.

of Florida[300]. In reviewing the Minister of Justice's decision to surrender Mr. Van Bergen, the Court of Appeal agreed with the Minister's conclusion that "Mr. Van Bergen would need to establish serious prejudice to him in the process in the foreign state". The Minister and the Court noted that Mr. Van Bergen was represented by counsel when he pled guilty to the Florida charges and was extensively questioned by the Florida judge who accepted his plea, and thus no serious prejudice resulted from the breach.

6.94 A 1981 Australian case, *R. v. Abbrederis*[301], also rejected the implication that Article 36(1)(b) was fundamental to due process. In that case, an Austrian national appealed his conviction for possession of heroin. He argued that statements he had made to customs officers before he was accorded access to his consular officer should have been excluded from evidence. The Court of Criminal Appeal of New South Wales flatly disagreed, concluding that:

> Even giving the fullest weight to the prescriptions in Art 36, I do not see how it can be contended that they in any way affect the carrying out of an investigation by interrogation of a foreign person coming to this country. The article is dealing with freedom of communication between consuls and their nationals. It says nothing touching upon the ordinary process of an investigation by way of interrogation[302].

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[300] *Canada v. Van Bergen*, 261 A.R. 387, 390 (2000), Annex 23, Exhibit 128

[301] *R. v. Abbrederis*, (1981) 36 A.L.R. 109, Annex 23, Exhibit 129.

[302] *Id.* at pp. 122-123.

6.95 Finally, in *Re Yater*[303], the Italian Court of Cassation declined to nullify the criminal convictions of a citizen of the United Kingdom on the grounds that the British Consul had not been notified either of his arrest or of the proceedings instituted against him so Article 36, including the sending State's right to provide for the detainee's representation, could not be exercised[304].

6.96 In short, there is not a single State – not even Mexico – whose practice can be pointed to in support of Mexico's argument that Article 36(1)(b) embodies fundamental due process rights and that, as a consequence, Article 36(2) requires the extraordinary remedies it seeks for breaches of Article 36(1)(b)[305].

6.97 There also is nothing in the *travaux* that supports Mexico's assertion that a breach of Article 36(1) constitutes a violation of due process necessitating exclusion and *vacatur* under Article 36(2). Not a single delegate made a single statement that even hinted at the meaning Mexico advances, nor its proposed remedy. Mexico's assertions to the contrary in paragraphs 339 through 343 of the Memorial are inaccurate and

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[303] "Judicial Decisions", in 1976 Italian Yearbook of International Law, Vol. II, pp. 336-39 (summarizing and quoting *re Yater*, which was decided by Italy's Court of Cassation on 19 Feb. 1973), Annex 23, Exhibit 130.

[304] *Id.* at p. 337.

[305] In two cases in the United Kingdom, *R. v. Van Axel and Wezer*, Snaresbrook Crown Court, HHJ Sich (31 May 1991), reported in Legal Action 12, Sept. 1991, Annex 23, Exhibit 131, and *R. v. Bassil and Mouffareg*, Acton Crown Court, HHJ Sich (28 July 1990), reported in Legal Action 23, Dec. 1990, Annex 23, Exhibit 132, the courts barred the use at trial of statements made by foreign nationals to police in circumstances that included a failure to make consular notification. Neither case, however, supports Mexico's advocacy of an automatic rule of suppression if consular notification is not made. *See* Weigend Declaration, para. 19, n.25, Annex 3.

misleading[306]. In fact, several delegates expressed their concern

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[306] Mexico references statements made at the International Law Commission by members speaking in their personal capacity. These are not an accurate reflection of the negotiating record of the VCCR. Moreover, other members expressed contrary views. For example, Sir Gerald Fitzmaurice (the drafter of the first draft article addressing consular notification) stated: "To regard the question as one involving primarily human rights or the status of aliens would be to confuse the real issue. . . . [T]he object of his proposal was to ensure that an alien had rights equal with a national's in the circumstances covered by the text". 1960 Yearbook of the International Law Commission, Vol. I, Summary Records of the Twelfth Session, document A/CN.4/SER.A/1960 (535th Meeting, 9 May 1960), p. 49, para. 8, Annex 23, Exhibit 133. Mr. Erim agreed: "the proposed new article 30A dealt with the rights and duties of consuls and not with the protection of human rights or the status of aliens. . . . [T]he discussion should . . . not be broadened to cover other subjects which were involved only incidentally in the proposed provision". *Id.* at p. 49, para. 14.

Mexico also significantly distorts the interventions it cites from the Diplomatic Conference in paragraph 342 of its Memorial. The Korean intervention Mexico cites was made in response to a proposal by Thailand to delete paragraph 1(b) in its entirety. Thailand: amendment to article 36, document A/CONF.25/C.2/L.101, in United Nations, *Conference on Consular Relations, Vol. II, Annexes: Proposals and amendments submitted in the Second Committee*, document A/CONF.25/16/Add.1, 1963, p. 84, Annex 23, Exhibit 134. In the rest of the intervention (omitted by Mexico), Korea supported a United States amendment, United States of America: amendments to article 36, document A/CONF.25/C.2/L.3, in United Nations, *Conference on Consular Relations, Vol. II, Annexes: Proposals and amendments submitted in the Second Committee*, document A/CONF.25/16/Add.1, 1963, p. 73, Annex 23, Exhibit 135, but sought to have "without undue delay" replaced by the German proposal, Federal Republic of Germany: amendments to article 36, document A/CONF.25/C.2/L.74, in United Nations, *Conference on Consular Relations, Vol. II, Annexes: Proposals and amendments submitted in the Second Committee*, document A/CONF.25/16/Add.1, 1963, p. 81, Annex 23, Exhibit 92, to require notification within *one month* "which conformed with practice in his country". United Nations, *Conference on Consular Relations, Vol. I, Summary records of plenary meetings and the meetings of the First and Second Committees,* document A/CONF.25/16, 1963, p. 338, para. 11, Annex 23, Exhibit 7.

regarding the relationship between State criminal laws and the proviso. The delegates from the Union of Soviet Socialist Republics and other Warsaw Pact States – without whose final support the VCCR could not have been concluded – strongly

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The Greek intervention Mexico cites, United Nations, *Conference on Consular Relations, Vol. I, Summary records of plenary meetings and the meetings of the First and Second Committees,* document A/CONF.25/16, 1963, p. 339, paras. 13-14, Annex 23, Exhibit 7, was made in connection with its proposal, Greece: amendment to article 36, document A/CONF.25/C.2/L.125, in United Nations, *Conference on Consular Relations, Vol. II, Annexes: Proposals and amendments submitted in the Second Committee*, document A/CONF.25/16/Add.1, 1963, p. 87, Annex 23, Exhibit 136, to require arresting officials to "state the reason why [the alien] is being deprived of his liberty". This proposal was rejected. Mexico omits that Greece was also prepared to accept the German proposal if it was modified to require notification within ten days. United Nations, *Conference on Consular Relations, Vol. I, Summary records of plenary meetings and the meetings of the First and Second Committees,* document A/CONF.25/16, 1963, p. 339, para. 15, Annex 23, Exhibit 7.

The Spanish intervention Mexico cites was made in response to a Venezuelan proposal to amend paragraph 1(a) of Article 36 in an attempt to clarify the article and improve its form. Venezuela: amendment to article 36, document A/CONF.25/C.2/L.100, in United Nations, *Conference on Consular Relations, Vol. II, Annexes: Proposals and amendments submitted in the Second Committee*, document A/CONF.25/16/Add.1, 1963, p. 84, Annex 23, Exhibit 134. The full text of the Spanish Intervention is as follows: "The right of the nationals of a sending State to communicate with and have access to the consulate and consular officials of their own country, *established by the International Law Commission's draft*, was one of the most sacred rights of foreign residents in a country." United Nations, *Conference on Consular Relations, Vol. I, Summary records of plenary meetings and the meetings of the First and Second Committees,* document A/CONF.25/16, 1963, p. 332, para. 36 (emphasis added), Annex 23, Exhibit 7. The International Law Commission draft Spain was referring to, used the phrase "without undue delay". *Draft articles on consular relations adopted by the International Law Commission at its thirteenth session*, document A/CONF.25/6, art. 36, in United Nations, *Conference on Consular Relations, Vol. II, Annexes,* document A/CONF.25/16/Add.1, 1963, p. 24, Annex 23, Exhibit 90.

preferred the clearly less intrusive ILC version of the proviso[307] over the alternative ultimately adopted[308]. The Soviet delegation stressed that the matters dealt with in Article 36 were connected with the criminal law and procedure of the receiving State, which were outside the scope of a convention that dealt with the codification of consular law. The delegates from Byelorussia and Romania spoke in similar terms: they were emphatic that the Conference was drafting a consular convention, not an international penal code, and it had no right to attempt to dictate the penal codes of sovereign States. If Article 36(2) is properly understood to mean what Mexico now argues it means, then it would not have been acceptable to these delegates.

6.98 While these statements were made in support of the ILC proposal that was not adopted, they nevertheless reflect a publicly stated understanding of the negotiators with respect to the implications of the provisions they were addressing. They are the most direct references made during the negotiating

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[307] Paragraph 2 of Article 36 as adopted by the International Law Commission 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 not nullify these rights." *Report of the International Law Commission to the General Assembly Covering the work of its thirteenth session*, document A/4843 in 1961 Yearbook of the International Law Commission, Vol. II, Documents of the thirteenth session including the report of the Commission to the General Assembly, document A/CN.4/SER.A/1961/Add.1, p. 112, Annex 23, Exhibit 91.

[308] *See, e.g.*, United Nations, *Conference on Consular Relations, Vol. I, Summary records of plenary meetings and the meetings of the First and Second Committees*, document A/CONF.25/16, 1963, p. 40, para. 3, Annex 23, Exhibit 7 (statement of delegate of U.S.S.R.); *id.* at p. 40, para. 8 (statement of delegate of Byelorussia). *See also id.* at p. 38, paras. 25-28 (statement of the delegate of Romania, who also preferred the less intrusive draft and stated that "[t]he aim of the convention was not to codify criminal law or criminal procedure, but international law as it affected consular relations". *Id.* at p. 38, para. 26.).

session to the criminal justice systems of receiving States. Thus, it is significant that neither these statements, nor any others, elicited any responsive statement expressing the expectation that criminal proceedings would be held in abeyance for consular notification to be completed, or that the results of a criminal justice process would be subject to challenge if consular information inadvertently was not given. The negotiating history does not support Mexico's novel reading of Article 36(1) or 36(2).

6.99 There is likewise nothing in the *travaux* to suggest general, or even appreciable, support for the adoption of an automatic exclusionary rule of evidence in relation to Article 36. Even in the United States, the use of an exclusionary rule to discourage unlawful police practices – not principally, it should be recalled, to avoid injustice in a particular case – did not gain widespread acceptance until near the end of the lengthy negotiations of the VCCR[309]. There is certainly nothing in the *travaux* to indicate a sudden or enthusiastic rush by other delegations to embrace what would certainly have been seen at the time as, at best, a novel legal doctrine.

6.100 In short, there is no validity to Mexico's argument that Article 36(1) establishes fundamental due process rights or human rights. This argument therefore cannot support Mexico's larger argument, that Article 36(2) requires the United States to treat any breach of Article 36(1) as a fundamental rights violation, requiring a remedy of *vacatur* and exclusion of evidence.

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[309] *See Mapp v. Ohio*, 367 U.S. 643, 655 (1961), Annex 23, Exhibit 137; *Miranda v. Arizona*, 384 U.S. 436, 478-479 (1966), Annex 23, Exhibit 15.

5. Mexico's Invocation of the Doctrine of Effectiveness Does Not Support its Proposed Reading of the Proviso

6.101 Mexico argues that: "[t]he 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)"[310]. Mexico suggests that "[u]nder international law, the United States is required to take whatever action is necessary to give effect to its treaty obligations"[311]. This, however, goes only to the limits of the obligation actually imposed by the VCCR under international law and no further. The clemency processes in the ten states relevant to this case all will consider any claim raised by the defendant regarding a breach of Article 36. That is what *LaGrand* requires. The rule of effectiveness does not require or even permit this Court to rewrite the VCCR to impose on a party an obligation, not express or clearly implied in that treaty, under the guise of providing a remedy for a breach.

6.102 It is well-settled that parties to a treaty should be presumed to have the intention to make it effective[312]. Thus, the ancient maxim *ut res magis valeat quam pereat*, often referred

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[310] Mexico Memorial, para. 283. *See generally* Mexico Memorial, paras. 283-298. Mexico there discusses at length whether remedies need to be effective and whether there is an obligation of result. To be clear, the process for review and reconsideration ordered by the Court in *LaGrand* has to be effective. That is, it must be capable of "allow[ing] the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention". *LaGrand, Judgment*, para. 125. The United States criminal justice systems conform to this standard.

[311] Mexico Memorial, para. 284.

[312] *See The S.S. "Wimbledon," Judgment, 1923, P.C.I.J., Series, A., No. 1*, pp. 24-25 ("the Court feels obliged to stop at the [interpretive] point where the so-called restrictive interpretation would be contrary to the plain terms of the article and would destroy what has been clearly granted"); *Oppenheim's*, *supra* note 90 at p. 1278, Annex 23, Exhibit 61.

to as the "rule of effectiveness," is a settled principle of treaty interpretation[313], but its scope and applicability remain subject to considerable debate. In its basic formulation, parties to a treaty "are assumed to intend the provisions of a treaty to have a certain effect, and not to be meaningless"[314].

6.103 To the extent that this Court has discussed the principle,

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[313] The "rule of effectiveness" is not specifically enumerated in the VCLT. Nor was it included expressly in the International Law Commission draft articles on the law of treaties. However, the International Law Commission considered that, to the extent the effectiveness principle reflects a true general rule of interpretation, it is embodied in the general rule that calls for a treaty to be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. United Nations, *Report of the International Law Commission to the General Assembly, Draft Articles on the Law of Treaties with Commentaries*, document A/6309/Rev.1 in 1966 Yearbook of the International Law Commission, Vol. II, Documents of the second part of the seventeenth session and of the eighteenth session including the reports of the Commission to the General Assembly, document A/CN.4/SER.A/1966/Add.1, p 219, para. 6, Annex 23, Exhibit 138. This general rule of good faith interpretation is included both in the International Law Commission draft articles on the law of treaties at Article 27, paragraph 1, and in the VCLT at Article 31, paragraph 1. In discussing the *ut res magis valeat quam pereat* maxim, the International Law Commission stated: "When a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation should be adopted. Properly limited and applied, the maxim does not call for an 'extensive' or 'liberal' interpretation in the sense of an interpretation going beyond what is expressed or necessarily to be implied in the terms of the treaty. Accordingly, it did not seem to the Commission that there was any need to include a separate provision on this point." *Id. See also* Ian M. Sinclair, *The Vienna Convention on the Law of Treaties*, pp. 74-75 (1973), Annex 23, Exhibit 201 ("the Commission seem to have believed that the principle of effectiveness expressed in the maxim *ut res magis valeat quam pereat* was subsumed in the reference to 'good faith' and 'the object and purpose of a treaty' contained in Article 31.").

[314] *Oppenheim's*, *supra* note 90 at p. 1280, Annex 23, Exhibit 61. *See also id.* at p. 1280 n.26 (surveying cases and commentators).

it generally has recognized that: "[i]t is the duty of the Court to interpret the Treaties, not to revise them"[315]. For example, the Court noted: "The principle of interpretation expressed in the maxim: *Ut res magis valeat quam pereat*, often referred to as the rule of effectiveness, cannot justify the Court in attributing to the provisions for the settlement of disputes in the Peace Treaties a meaning which, as stated above, would be contrary to their letter and spirit"[316]. Likewise, the Court also made clear that the effectiveness principle would be inapplicable where: "the Court would have to go beyond what can reasonably be regarded as being a process of interpretation, and would have to engage in a process of rectification or revision"[317]. The Court concluded: "[r]ights cannot be presumed to exist merely because it might seem desirable that they should"[318]. Perhaps some treaties could be made more "effective" if more drastic or far-reaching remedies for their breach were engrafted upon them. But the very fact that the terms of a treaty may not set down a fully effective remedy (or, as here, no specific remedy)

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[315] *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Second Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 229. Mexico makes reference, in its Memorial at paragraph 289, to the jurisprudence of the European Court of Human Rights (hereinafter referred to as the "ECHR") on the question of effectiveness. But that Court's decisions are in accordance with the well-settled rule "that the terms of any treaty are the primary reference point and no interpretation which is inconsistent with the text, whatever its other merits, can be regarded as legally correct." J.G. Merrills, *The Development of International Law by the European Court of Human Rights*, p. 120 (1993), Annex 23, Exhibit 139 (discussing the "effectiveness principle" as applied by the ECHR to the European Convention on Human Rights). One consideration that has often prompted the ECHR "not to adopt an extended interpretation . . . [has been its conclusion that] some matters are best left to national regulation." *Id.* at p. 122.

[316] *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Second Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 229.

[317] *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, p. 48, para. 91.

[318] *Id.*

may be due precisely to "the inability of the parties to reach agreement on fully effective provisions; in such a case the court cannot invoke the need for effectiveness in order, in effect, to revise the treaty to make good the parties' omission"[319].

6.104 Here, there is no validity to Mexico's suggestion that the United States is not giving full effect to the review and reconsideration remedy of *LaGrand*. United States courts and clemency authorities provide careful review of the consequences of a breach of the VCCR. *LaGrand* does not require a different approach. The remedy required is an effective *process* that *takes into account* the breach of the VCCR, not, as Mexico would have it, a specific and favorable outcome in every case. The remedial aspect of Article 36(2) does not require that the receiving State, in providing review and reconsideration in a case where a breach of Article 36(1) may occur, ignore whether actual consular notification occurred in fact, or whether the foreign national in fact understood his substantive criminal justice rights, was represented by competent legal counsel, had interpretative assistance when necessary, or had the assistance of his family, friends, or other experts in the development of mitigation evidence, or that the receiving State otherwise refrain from considering the actual implications of the breach for the conviction and sentence. "Review and reconsideration" requires simply that a decision maker take a second, good faith look at an individual case "taking account of the violation of the rights set forth"[320] in the VCCR. *LaGrand* does not require anything further – much less the extraordinary step Mexico proposes of vacating a conviction or sentence and retrying the case[321]. The rule of effectiveness

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[319] *Oppenheim's, supra* note 90 at 1281, Annex 23, Exhibit 61.

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

[321] A decision to leave the conviction or sentence undisturbed, after full review and reconsideration, in fact speaks well of the United States' criminal justice systems, because it reconfirms that a foreign national has received a

does not support a different conclusion.

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fair trial. It in no way calls into question the adequacy of the appellate or clemency process.

CHAPTER VII

THE COURT SHOULD NOT FIND VIOLATIONS OF ARTICLE 36(1) OR (2) IN ANY OF THE FIFTY-FOUR CASES, BECAUSE MEXICO HAS FAILED TO MEET ITS BURDEN OF PROOF REGARDING THEM

7.1 The Court should now turn to the fifty-four cases Mexico has put in issue against the legal parameters and the factual backdrop that the United States has provided, subject to the fundamental point that the Court is not and should not act as a court of criminal appeal. To the extent that the Court decides to consider individually each of the fifty-four cases, its role is straightforward. It should first determine whether any of them is appropriate for review by this Court. If review is appropriate, it should then determine whether there was a breach of Article 36(1)(b) and, if so, of Article 36(2) as well. The Court should proceed with caution, however, because Mexico's descriptions of these cases, to the extent that they even attempt to venture beyond the conclusory, do not provide a reliable basis for decision by this Court. In light of its on-going investigation, the United States has been able to develop the more accurate statements of relevant facts set forth in Annex 2, which Annex is based in large part on the conclusions drawn in the course of litigation by courts of competent jurisdiction in the United States. Those conclusions were reached after presentation of evidence to juries or judges, with the responsibility and opportunity for assessing witness credibility, examining the physical evidence, and weighing all of the other information presented by both the prosecution and defense.

7.2 No remedy of any sort will be necessary or appropriate except in those cases where Mexico carries its burden of

proving a breach of some relevant provision of Article 36[322]. This is required under the principle of *actori incumbit probatio*, and is well-settled in the Court's jurisprudence[323]. Where there is a failure of proof (or its complete absence) a submission should be rejected as unproved. Where the evidence is insufficient to permit the Court to reach definitive conclusions with respect to critical facts in dispute (which the Court may conclude is the case as regards these fifty-four cases because the United States and Mexico sharply disagree about many of the critical facts) such claims too should fail, for the Court "cannot . . . apply a presumption that evidence which is unavailable would, if produced, have supported a particular" point of view[324]. The importance of a rigorous review of the facts (and the concomitant requirement to resolve doubts regarding the evidence against Mexico) is well illustrated by the fact that, after raising the case of Angel Maturino Resendiz in its

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[322] Mexico apparently seeks to shirk its obligation of proof by arguing that "placing the burden of showing prejudice on the victim of the violations would deny to Mexico and its nationals the full effect of the Article 36 provisions", Mexico Memorial, para. 384, but the Court should reject this bald attempt to shift the burden. It falls squarely on Mexico to prove all the elements of its claim and as we state, *infra* at Chapter VII.D there can be no breach of Article 36(2) . Mexico has failed to meet its burden of establishing facts and, in many cases, makes factual representations that have been specifically considered and rejected by a competent court in the United States. Those courts were in the best position to review all of the evidence, to consider all of the arguments advanced by the interested parties, and to make judgments as appropriate.

[323] *See, e.g., 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, in which the Court noted that "it is the litigant seeking to establish a fact who bears the burden of proving it; and in cases where evidence may not be forthcoming, a submission may in the judgment be rejected as unproved, but is not to be ruled out as inadmissible *in limine* on the basis of an anticipated lack of proof".

[324] *Land, Island and Maritime Frontier Dispute (El Salvador / Honduras: Nicaragua intervening), Judgment, I.C.J. Reports 1992*, p. 399, para. 63.

application and seeking the issuance of provisional measures on his behalf, Mexico upon further investigation has conceded that Maturino Resendiz was provided consular information without delay[325].

A. None of the Cases Involving Mexican Nationals is Appropriate for Consideration by This Court

7.3 In the Chapter on Admissibility, we noted that none of the cases involving Mexican nationals is in an appropriate posture for review by an international tribunal. More specifically, litigation is pending before courts in the United States in all but four of the fifty-four cases raised by Mexico. In many cases, the first direct appeal of the conviction and sentence is still pending[326]. The four cases in which no litigation is pending include two of the three persons who have been granted clemency and are no longer facing capital punishment (the third continues to pursue a federal habeas petition)[327]. The individuals in the two final cases[328] have exhausted their judicial appeals, but both are eligible to file clemency petitions though they have not yet pursued this municipal remedy[329].

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[325] Mexico Memorial, para. 89 n.112.

[326] #3 Benavides, #5 Contreras Lopez, #6 Covarrubias Sanchez, #7 Esquivel Barrera, #8 Gomez Perez, #9 Hoyos, #10 Juarez Suarez, #11 Lopez, #12 Lupercio Casares, #13 Maciel Hernandez, #14 Manriquez Jaquez, #16 Martinez Sanchez, #17 Mendoza Garcia, #22 Salcido Bojorquez, #24 Tafoya Arriola, #27 Verano Cruz, #28 Zambrano, and #50 Hernandez Alberto.

[327] #45 Caballero Hernandez, #46 Flores Urbán, and #47 Solache Romero were granted clemency.

[328] #31 Fierro Reyna and #39 Moreno Ramos.

[329] Further, Fierro Reyna has failed to exhaust municipal judicial remedies because he raised his VCCR claim in his third state *habeas* petition, then failed to pursue the claim when the 171st District Court of El Paso, Texas, declined to order a hearing on the issue after finding that the claim was without merit and in any case was procedurally barred. *See* Cases Declaration, Appendix 31, para. 8, Annex 2.

B. Mexico Has Not Proven its Allegations of Breaches of Article 36(1)(b) With Respect to the Fifty-Four Cases

7.4 The specifics of all fifty-four cases are set forth in Annex 2. To establish its claim that each of these cases involved a breach of Article 36(1)(b), Mexico must establish each of the essential elements to such a finding. First, it is to our knowledge undisputed that Article 36 does not protect nationals of the receiving state, and that dual nationals may be treated by each State of nationality as exclusively its own national while in its territory, including with respect to consular notification[330]. Thus, the United States owed obligations to Mexico only with respect to persons who at the time of their arrest were Mexican nationals and not also United States nationals.

7.5 Second, no obligation can be due in the case of a foreign national who is arrested if the fact that he is a foreign national is

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[330] *See, e.g.*, Luke T. Lee, *Consular Law and Practice*, p. 159 (1991), Annex 23, Exhibit 140 (consular protection "may only be given [to dual nationals] either unofficially or in exceptional circumstances . . . . As Satow puts it: 'The 'effective' nationality in such circumstances is that of the receiving state.'" (citing Satow, *Guide to Diplomatic Practice* (Lord Gore Booth ed., 1979), p. 27.6.) *See also*; R.C.R. Siekmann, "Netherlands State Practice for the Parliamentary Year 1982-1983", in 1984 Netherlands Yearbook of International Law, Vol. 15, p. 344, Annex 23, Exhibit 141 ("Generally . . . the receiving State will give precedence to its own nationality"). The peculiar nature of dual nationals at international law is recognized by the VCCR itself in Article 71, which distinguishes between those members of a consular post who are nationals of a receiving State and those who are not, for purposes of immunity and jurisdiction, and in Article 22, which provides that "[c]onsular officers may not be appointed from among persons having the nationality of the receiving State except with the express consent of that State which may be withdrawn at any time". Exceptions are made explicitly, by treaty. *See* Consular Convention, 17 Sept. 1980, United States of America-People's Republic of China, art. 35, 33 U.S.T. 2973, amended by exchange of notes, 33 U.S.T. 3042, para. 2, Annex 23, Exhibit 85.

not known. Given its extraordinarily diverse citizenry, there is no *a priori* basis in the United States for making assumptions that a person taken into custody is not a United States national based on extrinsic factors. Only when the competent authorities are aware that they have arrested a foreign national would the VCCR's obligations be clearly applicable[331]. Mexico suggests that the obligation arises when the arresting officers "had reason to know" that a person is Mexican[332]. Applying even this somewhat lower standard, for purposes of argument, Mexico still must bear the burden in each case of proving that the arresting officers in fact knew or reasonably should have known that they had arrested a Mexican national, and doubts must be resolved against Mexico.

7.6 Third, Mexico must establish that each Mexican national nevertheless was not given consular information under Article 36(1)(b). It is not sufficient to allege that Mexico was not officially notified, since such an allegation does not rule out the possibility that the foreign national was informed of the possibility of consular notification but declined it.

7.7 A careful examination of Mexico's Memorial shows that it has failed to meet its burden of proof with respect to each of these essential elements. First, it has not offered proper proof of Mexican nationality in any of the fifty-four cases. This is no small matter; even where nationality laws confer citizenship automatically upon birth in a country, they may result in loss of nationality if certain conditions arise, such as acquisition of foreign nationality[333].

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[331] *See, e.g., LaGrand, Judgment*, paras. 16, 54. Considerable effort was spent establishing precisely when each state became aware of the nationality of the LaGrand brothers. Their true nationality became known sometime between trial and sentencing.

[332] *See* Mexico Memorial, para. 11.

[333] The Declaration of Roberto Rodriguez Hernandez, Annex 7 to the Memorial, provides no explanation of how Mexico determined that all of the

7.8 Further, Mexico has failed adequately to address the question of dual United States-Mexican nationality. While quite commonly someone Mexico could establish is a Mexican citizen is not also a United States citizen, this is not necessarily the case and is not a basis on which Mexico can meet its burden when there are clear indications to the contrary. We have confirmed that at least one person whose case Mexico has advanced is a United States citizen, and was so at the time of his arrest. The facts about a number of the other persons raise a substantial possibility that they were also United States citizens at the time of their arrests, but this cannot be confirmed without obtaining information that is best available to Mexico and the individuals whose claims it seeks to advance[334]. The United

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individuals are Mexican nationals. The case summaries in Appendix A to that Declaration generally either assert Mexican nationality or birth in Mexico without citing any supporting Mexican law, document, or determination establishing Mexican nationality. Where documents indicating Mexican nationality are cited, they are generally records that originated in the United States that inherently cannot be formal determinations of Mexican nationality. In a few cases, *e.g.*, # 9 Hoyos, a Mexican document is referenced, but no copy is provided. No effort is made to address the possibility of loss of Mexican nationality.

[334] The United States has confirmed that #28 Zambrano was and is a United States citizen. We understand that two others, #1 Avena Guillen and #2 Ayala, were born to a United States citizen parent; our on-going investigation indicates that they are likely United States citizens (Ayala almost certainly). The limited background information available on # 4 Carrera Montenegro, #5 Contreras Lopez, #8 Gomez Perez, #13 Maciel Hernandez, #16 Martinez Sanchez, #18 Ochoa Tamayo, #20 Ramirez Villa, #21 Salazar, #24 Tafoya Arriola, #29 Zamudio Jimenez, #36 Leal Garcia, #40 Plata Estrada, #41 Ramírez Cardenas, #43 Regalado Soriano, #46 Flores Urbán, and #53 Torres Aguilera suggests some possibility that these individuals are United States citizens. There are nationality questions about others as well. For example, we cannot rule out the possibility that #11 Lopez, #15 Fuentes Martínez, #19 Parra Dueñas, #23 Sanchez Ramirez, #30 Alvarez, and #42 Rocha Diaz, all of whom we understand arrived in the United States as minors and acquired United States citizenship. We do not have sufficient information about #7 Esquivel Barrera to assess his

States had no obligation to provide consular information to any person who was a United States citizen at the time of his arrest, and therefore no breach of Article 36(1)(b) could be found in such cases.

7.9 When the fifty-four cases are considered in light of Mexico's proposed standard, that the competent authorities in each of the fifty-four cases "knew or reasonably should have known" that they had arrested a Mexican national, it is again clear that Mexico has not met its burden. It is not enough to assert that, because a person was born in Mexico, the arresting authorities should have known he was not a United States citizen, but a Mexican. A person could be born in Mexico as a United States citizen, or could have become a United States citizen after arriving in the United States. If a person affirmatively represents himself to be a United States citizen, he cannot later complain that he was not given consular information under Article 36 since he was misrepresenting his nationality. At a minimum, it must be shown that his true nationality became known and, until then, no obligation arose under the VCCR. Even if the question of nationality is not explicitly addressed at the time of arrest, the key indicators of foreign nationality are not just place of birth, but language, education, parentage, and other factors that speak to whether a person appears to those who encounter him to be a United States citizen. Given the fact that many of the defendants in the fifty-four cases have lived most of their lives in the United States, speak English, were educated in the United States, have family in the United States – in some cases a United States citizen parent – Mexico must do much more than it has done to establish that the competent authorities knew or should have

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citizenship status. *See* Cases Declaration, corresponding Appendices, Annex 2; Declaration of Edward Betancourt, paras. 4-6, 8, Annex 18; Declaration of Dominick Gentile, para. 8, Annex 19; Declaration of Joseph Greene, para. 3, Annex 20.

known that they were not dealing with a United States citizen, but instead with a Mexican national[335].

7.10 For example, at least seven of the fifty-four individuals appear to have affirmatively claimed to be United States citizens at the time of their arrest[336]. The case of Ramon Salcido Bojorquez (case #22) is exemplary in this regard. After murdering eight people in 1989, he fled to Mexico where he was arrested. He subsequently told a Mexican court in Mazatlan, Sinaloa that, though born in Mexico, he married a United States citizen and had thereby acquired United States citizenship and had renounced his Mexican citizenship. He asked to be sent back to the United States for trial and reiterated this request in a statement broadcast on television in Mexico. Respecting his assertion of United States citizenship, and his expressed desire to waive extradition, Mexico deported him to the United States, where he was taken into custody. Approximately four months after his deportation to the United States he sent a letter to the Mexican consulate asserting that he

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[335] As discussed further below, Mexico's generalized assertions, and its reliance on the fact that federal immigration records may in some cases have indicated Mexican nationality, cannot meet this burden given the sworn declarations of United States officials concerning the complexity of the citizenship laws of the United States, the difficulty of establishing whether an individual is a United States citizen, and the fact that state and local law enforcement officials do not necessarily have easy access to nationality data held by the federal government. *See* Betancourt Declaration, paras. 2-10, Annex 18; Gentile Declaration, paras. 4-8, Annex 19; Greene Declaration, para. 3 Annex 20; Criminal Justice Declaration, paras. 10-12, Annex 7.

[336] #1 Avena Guillen (arrest report lists place of birth as California); #2 Ayala (court document filed in 1989 identified him as a United States citizen); #3 Benavides (defense counsel advised court he had become a United States citizen); #18 Ochoa Tamayo (court record filed in 1992 indicates he was a United States citizen born in Mexico); #22 Salcido Bojorquez (see text that follows); #24 Tafoya Arriola (booking records and a court report filed in 1995 both identify him as a United States citizen); #30 Alvarez (Texas records identify him as a United States citizen).

was in fact Mexican[337].

7.11 In another twenty cases, the relevant information suggests that arresting authorities would have reasonably assumed that they had arrested a United States citizen, if they had considered the issue at all[338]. In some of these cases Mexico alleges that the competent authorities should have known consular information was required because of the individual's immigration status[339]. But Mexico has failed to show that state and local police in fact had access to immigration data, which is maintained by a federal agency. In the case of Juan Carlos Alvarez[340], for example, it has simply asserted that Texas state authorities should have known he was a Mexican national because he had been previously been in INS custody – that is, the custody of a federal, not state, agency –

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[337] *See* Cases Declaration, Appendix 22, Annex 2.

[338] All of the following would have presented strong indications of being United States citizens: #4 Carrera Montenegro, #5 Contreras Lopez, #8 Gomez Perez, #11 Lopez, #13 Maciel Hernandez, #16 Martinez Sanchez, #20 Ramirez Villa, #21 Salazar, #23 Sanchez Ramirez, #25 Valdez Reyes, #29 Zamudio Jimenez, #36 Leal Garcia, #37 Maldonado, #38 Medellin Rojas, #40 Plata Estrada, #41 Ramírez Cardenas, #43 Regalado Soriano, #45 Caballero Hernandez, #46 Flores Urbán, #53 Torres Aguilera. *See* Cases Declaration, corresponding Appendices, Annex 2.

[339] #4 Carrera Montenegro (Mexico cites Carrera Montenegro's registration with the INS as a permanent resident as the reason why competent state authorities should have provided consular information); #5 Contreras Lopez (Mexico asserts that his registration with the INS as a permanent resident since 1989 "would have emerged as a matter of course during any routine background check'); #13 Maciel Hernandez (Mexico claims that his registration with the INS as a permanent resident "would have emerged through a routine police background check'); #25 Valdez Reyes (Mexico notes he was registered as a temporary resident at the time of his arrest as support for its assertion that California police should have known consular information was required); #53 Torres Aguilera (Mexico cites Torres Aguilera's registration with the INS as a permanent resident as the reason why competent authorities should have provided consular information).

[340] *See* Cases Declaration, Appendix 30, Annex 2.

facing possible deportation. But this post-hoc argument is in no way linked to any actual duty or practice on the part of Texas to make such an inquiry, nor to any evidence that such an inquiry if made would have yielded a response in any particular period of time. Mexico's argument is particularly unpersuasive given the fact that immigration status would be irrelevant to the criminal investigation and that state police have no responsibility for enforcing federal immigration laws and are often reluctant routinely to inquire into a person's immigration status in order to minimize the risk of allegations of discrimination[341].

7.12 Finally, Mexico has failed to meet its burden of establishing in all of the fifty-four cases that, if arresting authorities knew they had a Mexican national in custody, they failed to provide consular information as required. No declarations from the actual persons concerned have been

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[341] *See supra* note 335; *see also* Muzaffar A. Chishti, "Migration Regulation Goes Local: The Role of States in U.S. Immigration Policy", in *New York University Annual Survey of American Law*, Vol. 58, No. 3, 2002, pp. 372-373, Annex 23, Exhibit 142 ("The attitude of many local police chiefs even in the highly security-conscious post-September 11 atmosphere indicates that police continue to fear risking relationships with immigrant communities. . . . Experience also suggests that if local police are known to have cooperative relationships with the INS, members of immigrant communities may be less likely to report crimes or otherwise offer assistance to officers investigating crimes. Furthermore, United States citizens in ethnic communities may also be likely to stop cooperating with the police if they believe that they are viewed with suspicion because of their ethnicity."); Judge Linda Reyna Yañez & Alfonso Soto, "Local Police Involvement in the Enforcement of Immigration Law" in *Hispanic Law Journal*, Vol 1, No. 1, 1994, pp. 45-46, Annex 23, Exhibit 143; *id.* at p. 45 ("[Q]uestioning all suspects on their immigration status would hardly be considered impermissible when proceeded by, and followed with, a number of questions regarding the crime under state law. Still, courts have prohibited state and local police's questioning suspects about their right to be in the United States, their nationality, their national origin, and their place of birth, even when the contact comes through state traffic or criminal charges".).

submitted. Moreover, our own efforts have uncovered cases in which such information clearly was provided.

7.13 For example, Pedro Hernández Alberto was, when arrested, carrying a card from the Orlando Mexican Consulate that informed him that he could communicate with his consulate and urged him to do so[342]. Knowing his Mexican nationality, the Police Chief advised him, in Spanish, of both his *Miranda* rights and that he could contact the Mexican Consulate, and gave him access to a telephone. Hernández Alberto gave no indication that he wanted a Mexican consular officer to know of his detention. In light of these facts (Hernández Alberto conceded at trial that Chief Garcia had told him that he could call the Mexican Consulate), there can be no question that Hernández Alberto was aware of the requirements of Article 36, was provided an opportunity to contact the Mexican consulate, and declined to do so[343].

7.14 Similarly, court transcripts demonstrate that Arturo Juarez Suarez was given consular information under the VCCR at his arraignment on 17 July 1998, two days after his arrest. When asked if he would like the authorities to contact the Mexican consulate, Suarez replied, "what for?" After conferring with his attorney, Suarez declined to request

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[342] *See* Cases Declaration, Appendix 50 and attached Exhibits, Annex 2.

[343] Mexico suggests in footnote 270 of Annex 7, Appendix A that because of Mr. Hernández Alberto's "mental illness, inability to speak English, and the fact that all of his prior dealings with the Mexican consulate were in Orlando, Florida it is doubtful he would have known how to contact the nearest consulate – even if provided a phone". Mexico Memorial, Appendix A to Annex 7, para. 324 n.270. This is simply untrue. Not only is his mental illness not established, but it is clear that his interactions with Chief Garcia were in Spanish, not English, and he could have asked for the number of the Mexican consulate at any time. Finally, regardless of the reasons for Mr. Alberto's decision not to request consular notification, the fact of the matter is that he was expressly given the opportunity to do so, which is all that the VCCR required of the United States in this case.

notification[344]. Although Mexico alleges a breach of Article 36(1)(b) based on its novel interpretation of "without delay," the actions of the authorities under these circumstances clearly complied with the VCCR[345]. In any event, inasmuch as Juarez Suarez evidently did not want the Mexican consulate notified, providing him consular information earlier would not have led to notification.

C. Mexico Has Not Proven Its Allegations of Breaches of Article 36(1)(c) With Respect to the Fifty-Four Cases

7.15 Mexico claims that the United States has also breached Article 36(1)(c) in the fifty-four cases, as an inevitable consequence of the alleged breaches of Article 36(1)(b). Mexico cannot meet its burden of establishing such violations, however, unless it first proves a violation of Article 36(1)(b) in each of the fifty-four cases, which it has failed to do. In addition, the Court made clear in *LaGrand* that a violation of Article 36(1)(c) flows from a violation of Article 36(1)(b) only when the consular officer is in fact prevented from rendering consular assistance[346]. Mexico concedes that, in twenty-two cases, consular notification in fact occurred in time to allow consular assistance to be provided prior to or at trial, thus precluding a breach of Article 36(2)[347]. In fact, in many of

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[344] *See* Case Declaration, Appendix 10, Annex 2 and attached transcript of proceedings, 17 July 1998, pp. 5-6.

[345] Mexico notes that the trial court ruled that authorities in California had breached the VCCR by failing to provide consular information under Article 36 "without delay." Mexico Memorial, Appendix A to Annex 7, para. 54. We believe providing consular information at arraignment meets the requirements of Article 36(1)(b). The trial court did not solicit or have the views of the United States on this issue.

[346] *See LaGrand, Judgment*, paras. 73-74.

[347] #3 Benavides (consulate learned of his detention approximately six months before trial) Mexico Memorial, Appendix A to Annex 7, para. 20; #6 Covarrubias Sanchez ("shortly after his arrest") *id.* at para. 37; #9 Hoyos (13 months after arrest, which is also at least six months before trial) *id.* at para.

these cases Mexico acknowledges that it provided assistance during pre-trial proceedings and trial preparations[348]. For

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51; #10 Juarez Suarez (within a few days, at most, of arrest) *id.* at para. 56; #15 Fuentes Martínez (during jury selection, which preceded the start of trial and occurred one month before verdict) *id.* at para. 81; #17 Mendoza Garcia (several months before trial) *id.* at para. 91; #20 Ramirez Villa (several months after arrest, which was almost three years before trial) *id.* at para. 108; #22 Salcido Bojorquez (two months after Mexico deported him to the United States, which was more than one year before trial) *id.* at para. 117; #23 Sanchez Ramirez (15 days after arrest, which was almost two years before trial) *id.* at para. 120; #27 Verano Cruz (five months after arrest, which was approximately a year-and-a-half before trial) *id.* at para. 145; #29 Zamudio Jimenez (four months after arrest, which was over a year before trial) *id.* at para. 154; #33 Gomez (several months after arrest, which was approximately 18 months before trial) *id.* at para. 191; #34 Hernández Llanas (two days after arrest, which was over two years before trial) *id.* at para. 198; #37 Maldonado (during trial, at least one month before verdict) *id.* at para. 222; #39 Moreno Ramos (11 months after arrest, during jury selection before trial began, and approximately one month before the verdict) *id.* at para. 243; #41 Ramírez Cardenas (four and a half months after arrest, which was more than seven months before trial) para. 259; #42 Rocha Diaz (more than 16 months after arrest, but more than one year before trial) *id.* at para. 267; #44 Tamayo (less than one week before trial) *id.* at para. 281; #47 Solache Romero (three days after arrest and more than a year before trial) *id.* at para. 309; #49 Camargo Ojeda (nine months after arrest, which was almost four months before trial and 30 months before the final sentencing hearing) *id.* at para. 321; #50 Hernandez Alberto (six weeks after arrest, which was more than two years before trial) *id.* at para. 325; #54 Reyes Camarena (five months after arrest, which was at least seven months before trial) *id.* at para. 360.

[348] Cases #6 Covarrubias Sanchez (consulate able to render assistance, including "facilitation of defense testimony and other legal assistance throughout the protracted pre-trial and trial proceedings") *id.* at para. 37; #9 Hoyos (consulate able to render "consular assistance, both legal and otherwise, . . . In particular, consular representatives met with trial counsel to discuss the plea bargain strategy and subsequently sent a letter to the district attorney in an effort to avoid the death sentence") *id.* at para. 51; #10 Juarez Suarez (consulate able to assist "the defense by obtaining visas for witnesses and submitting an affidavit in support of the defense motion to suppress"); *id.* at para. 56; #14 Manriquez Jaquez (consulate able to assist defense counsel in gathering evidence and to monitor the case) *id.* at para.

example, in the case of Hernández Llanas[349], Mexico concedes that it learned of his case only two days after his arrest[350]. During the course of his interrogation upon arrest for murder on

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74; #17 Mendoza Garcia (consulate able to render assistance, "including facilitating the processing of visas for defense witnesses, aiding in the presentation of the Vienna Convention violation at the trial level and writing to the court on behalf of Mr. Mendoza Garcia at sentencing") *id.* at para. 91; #20 Ramirez Villa (consulate able to render assistance, "both legal and otherwise. . . . In particular, consular officers communicated with defense counsel, provided funding for an expert jury consultant, attended court hearings, and subsequently sent a detailed letter in support of a reduced sentence based on the Vienna Convention violation." The Mexican government also wrote to the court on his behalf.) *id.* at para. 108; #22 Salcido Bojorquez (consulate able to monitor the proceedings and "assisted the defense by corresponding with Mexican law enforcement officials regarding the circumstances of [his] arrest and unlawful return to the United States") *id.* at para. 117; #23 Sanchez Ramirez (consulate able to assist defense counsel with a VCCR-based pre-trial motion to suppress and to testify at hearing) *id.* at paras. 120-121; #26 Vargas (consulate able to submit "legal arguments to the trial judge based on the Vienna Convention violation" prior to sentencing. In addition, consular officers testified during a hearing on Vargas' motion for a new trial "based on the violation of his rights under Article 36.") *id.* at paras. 138-139; #27 Verano Cruz (consulate able to render "both legal and other forms of assistance. . . . In particular, Mexican consular officers facilitated the travel of Mr. Verano Cruz's family members from Mexico to testify during the penalty phase of the trial.") *id.* at para. 145; #29 Zamudio Jimenez (consulate obtained visas for defense witnesses from Mexico to appear during the guilt phase and authenticated documents at trial) *id.* at para. 154; #42 Rocha Diaz (consular officers "inform[ed] [defense counsel] of the Article 36 violation" and assisted in the defense) *id.* at para 267; #47 Solache Romero (consular officer testified at suppression hearing about VCCR breach) *id.* at paras. 308-309; #49 Camargo Ojeda (consulate able to assist defense counsel by providing affidavits and letters regarding his "lack of a prior criminal record in Mexico") *id.* at para. 321; #54 Reyes Camarena (consulate able to render assistance, "both legal and otherwise. . . . Among other forms of assistance, the consulate assisted in locating witnesses and records in Mexico, and identified a bilingual neuropsychologist at trial counsel's request.") *id.* at para. 360.

[349] *Id.* at paras. 197-204.

[350] Mexico Memorial, Appendix A to Annex 7, para. 197-198.

15 October 1997, Hernández Llanas informed Texas authorities that he had a murder conviction in Mexico and had escaped from prison[351]. On 17 October, Texas law enforcement authorities contacted Mexican law enforcement authorities to inform them of the detention of the fugitive Hernández Llanas[352]. The Mexican consulate appears to have been informed of his detention that same day by Mexican law enforcement authorities[353]. Three days later, on 20 October, Texas authorities formally notified the Mexican consulate of Hernández Llanas' detention[354]. According to Mexico, its consular officers "began rendering assistance, both legal and otherwise", more than two years before his trial began[355].

D. Mexico Has Not Proven Breaches of Article 36(2) With Respect to the Fifty-Four Cases

7.16 Mexico next asserts that the United States has breached Article 36(2) by "foreclosing legal challenges to convictions and death sentences" because courts in the United States have declined to grant the requested remedy in cases where a VCCR

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[351] *Id.* at 4.

[352] *Id.* at 4.

[353] Mexico claims that it learned of his detention "without the assistance of the authorities from Texas or the United States" but does not indicate the source of its information. Mexico Memorial, Appendix A to Annex 7, para. 198.

[354] *Ex parte* Hernandez, Findings of Fact and Conclusions of Law Regarding Defendant's Motions to Suppress and on Defendant's Application for writ of Habeas Corpus Following Pre-Trial Suppression Hearing, No. A97-364, p. 4 (216th Dist. Tex, 5 Nov. 1998) (hereinafter, this case will be referred to as "*Ex parte* Hernandez"). This document is reprinted in Mexico Memorial, Annex 49, pp. A1031-1034.

[355] Mexico Memorial, Appendix A to Annex, para. 198. Mexican consular officers did not contact Hernández Llanas until 27 Oct. 1997; ten days after learning of his arrest and seven days after being formally notified by the Texas authorities. *Ex parte* Hernandez, *supra* note 354 at 4, Mexico Memorial, Annex 49, p. A1034.

claim has been raised, and because courts have applied their procedural default rules to the cases before them. As an initial matter, it should be noted that Article 36(2) addresses the "laws and regulations" of a State, not the application of those laws and regulations in a particular case. Insofar, therefore, as the Court concluded that the laws and regulations of the United States provide for review and reconsideration, as described by the Court in *LaGrand*, it should not proceed to consider each of them individually. Should it do so, however, a close examination of the cases cited by Mexico reveals that Mexico has failed to prove a single instance of breach of Article 36(2).

7.17 Obviously, in the context of the fifty-four cases, there can be no breach of Article 36(2) if there was no breach of Article 36(1). Therefore, the United States could not have breached Article 36(2) in those cases in which Mexico has failed to show a breach of Article 36(1)(b). The United States could not have breached Article 36(2) in the eleven cases in which the fact of any breach of Article 36(1)(b) was known in time to be raised in judicial proceedings but was not[356]. There can be no breach, for example, in the case of Rafael Camargo Ojeda[357] because he failed to raise any VCCR claims at trial or in any post-conviction proceedings to date, despite the Mexican consulate's learning of his case four months before his trial.

7.18 Nor can there have been a breach of Article 36(2) when a claim was known, timely raised, and considered. With the assistance of the Mexican consulate, eleven of these criminal defendants raised their VCCR claim during pre-trial procedures

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[356] #7 Esquivel Barrera, #8 Gomez Perez, #9 Hoyos, #13 Maciel Hernandez, #14 Mariquez Jaquez, #18 Ochoa Tamayo, #27 Verano Cruz, #29 Zamudio Jimenez, #39 Moreno Ramos, #49 Camargo Ojeda, and #50 Hernandez Alberto. *See* Cases Declaration, corresponding Appendices, Annex 2.

[357] #49 Camargo Ojeda. *See* Cases Declaration, corresponding Appendices, Annex 2.

or at trial[358]. In each case, the defendant could then pursue their VCCR claims in direct and collateral appeals.

7.19 Mexico complains that the courts' "refusal to recognize Article 36 rights as fundamental to due process constitutes a breach of Article 36(2) because it prevents the courts 'from attaching any legal significance' to the effect of such violations"[359], but this complaint is unfounded for the reasons we have already explained – nothing in Article 36 requires that the "laws and regulations of the receiving state" accord the requirements of Article 36(1) the status of fundamental due process rights, or grant such remedies when Article 36(1)(b) is breached. Moreover, given the Court's holding in *LaGrand* to provide "review and reconsideration of the conviction and sentence" in light of a breach of Article 36(1)(b) when serious penalties are imposed, it cannot possibly be the case that Article 36(2) is breached when a court, prior to the imposition of a sentence, weighs evidence produced with the assistance of Mexican consulates, considers arguments prepared under the guiding hand of Mexican consular officers, and determines after considered review that any breach of Article 36(1)(b), however regrettable, does not require that the case be tried or retried with evidence excluded.

7.20 Nor can there have been a breach of Article 36(2) when

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[358] *See* #10 Juarez Suarez (motion to suppress and/or preclude death penalty denied); #15 Fuentes Martínez (request for delay of trial denied); #17 Mendoza Garcia (motion to suppress denied); #20 Ramirez Villa (sought reduced sentence); #23 Sanchez Ramirez (pre-trial motion to suppress denied); #26 Vargas (motion for new trial denied); #33 Gomez (motion to suppress denied); #34 Hernandez Llanas (motion to suppress denied); #37 Maldonado (request for jury instruction denied); #42 Rocha Diaz (motion to suppress denied); #47 Solache Romero (motion to suppress denied). *See also* #6 Covarrubias Sanchez (sought hearing on day of sentencing). *See* Cases Declaration, corresponding Appendices, Annex 2.

[359] Mexico Memorial para. 238.

a claim was found to have been procedurally defaulted yet nevertheless was considered on the merits with a resulting finding of no prejudice. In several cases in which a failure to raise VCCR claims at trial has triggered procedural default, the courts examined the merits of the argument in the alternative and found that the failure to provide consular information was not prejudicial[360].

7.21 But more significantly, Mexico has failed to meet its burden of showing a breach of Article 36(2) in any of the fifty-four cases because it cannot show that the United States has not provided and will not provide review and reconsideration of any conviction and sentence. For if review is not obtained through the judicial process, it may be obtained through the clemency process. That process has already resulted in the capital sentences of three of the fifty-four persons being reduced.

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[360] #26 Vargas (trial court found that his statement was voluntary and that he had knowingly waived his *Miranda* rights. Mexican consulate learned of his detention 15 days after his arrest.); #36 Leal Garcia (in state *habeas* proceedings, the court noted his procedural default, but also rejected his claims of prejudice on the merits. In particular, the court found that Leal Garcia was not detained or in custody at the time he gave his statements. Thus, the court found, authorities were not obligated to inform Leal Garcia about Article 36 at the time they questioned him. It also found that Leal Garcia failed to show that the alleged VCCR breach prejudiced him at trial.); #38 Medellin Rojas (in state and federal *habeas* proceedings the courts found Medellin Rojas was not demonstrably prejudiced by the VCCR breach.); #40 Plata Estrada (state and federal courts found no prejudice); #41 Ramírez Cardenas (despite failure to raise at trial, state court considered claim on appeal and found no prejudice); #48 Fong Soto (in state *habeas* proceedings, court found that Fong Soto had failed to provide evidence that the results of the trial would have been different with the assistance of the Mexican Consulate, or that he was prejudiced by the lack of information at sentencing, *see* Mexico Memorial, Annex 42, pp. A837-A838); #52 Loza (court found no prejudice). *See* Cases Declaration, corresponding Appendices, Annex 2.

E. The Clemency Process Does Provide Meaningful Review and Reconsideration

7.22 The clemency process that Mexico contends is inadequate has already resulted in the commutation of the capital sentences of three of the fifty-four persons Mexico has included in this case. In January 2003, the Governor of Illinois granted clemency to three of the capital defendants – Juan Caballero Hernandez (case #45), Mario Flores Urban (case #46), and Gabriel Solache Romero (case #47) – and based his decision in part on his concern that VCCR obligations were not met in those cases. Through the Consul General and an attorney retained by Mexico, the Government of Mexico appeared on behalf of Solache Romero at his clemency hearing. Subsequent to that appearance, the Governor announced his clemency decision and specifically referred to the "five men on death row" (three of them Mexican nationals) "who were denied their rights under the Vienna Convention" [361].

7.23 Two additional cases of the fifty-four have reached the stage of clemency, which is generally applied for only after all avenues for judicial relief have been exhausted. These are the cases of César Robert Fierro Reyna (#31), and Roberto Moreno Ramos (#39), neither of whom has yet petitioned for clemency. Nevertheless, two previous cases – Javier Suarez Medina and Gerardo Valdez Maltos – have received review and reconsideration via the clemency process in response to specific requests by the United States to the appropriate clemency authorities. Each of these cases demonstrates the manner in which the clemency process may operate to provide the review and reconsideration called for in *LaGrand*[362].

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[361] *See* Cases Declaration, Appendix 47, Annex 2. *See also* Illinois Clemency Declaration, Annex 12.

[362] Mexico wrongly seeks support for its position that clemency review is inadequate by pointing, in paragraphs 264 to 279 of its Memorial, to the fact

that clemency was denied in the *Faulder* case, which pre-dated *LaGrand* and involved a Canadian national. First, Mexico has erroneously implied that the Department of State requested that Faulder be granted clemency based on a breach of Article 36; in fact, the letters sent by the Department of State to the Texas clemency authorities did not go that far. *See, e.g.*, Letter from Madeleine K. Albright, Secretary of State, United States Department of State, to Lloyd Axworthy, Minister of Foreign Affairs, Canada, 27 Nov. 1998, Mexico Memorial Annex 29, p. A435.

Second, Mexico has mischaracterized the facts relating to litigation, in *Faulder v. Texas Board of Pardons and Paroles*, involving the clemency process as applied to Faulder. Mexico selectively quotes from a decision by a United States District Court about the Texas Board of Pardons and Parole without acknowledging that the same Court held that Faulder and a co-petitioner "failed to prove that they were denied access to the clemency process or that the votes in their cases were arbitrary, capricious, whimsical, or based on improper factors". *Faulder v. Texas Board of Pardons and Paroles, et al.*, No. A 98 CA 801 SS, slip op. at 15 (W.D. Tex. Dec. 28, 1998), Annex 23, Exhibit 144. Mexico also fails to acknowledge that the fairness and adequacy of the Texas clemency process was specifically considered and upheld by the United States Court of Appeals in that very case. *See Faulder v. Texas Board of Pardons and Paroles*, 178 F.3d 343, 344-345 (5th Cir. 1999) (*per curiam*), *cert. denied*, 527 U.S. 1017 (1999), Annex 23, Exhibit 145. And, Mexico creates the misleading impression that the State Department letter to the Texas Board was ignored, citing the testimony of one member of the Board. But that member merely acknowledged what the Department itself said when it stopped short of recommending clemency for Faulder – that the Department did not have access to all of the relevant facts. (It is true, however, that the Department's letters in the *Faulder* case made several points that were not made in some subsequent Mexican cases; this reflected the Department's different assessments of the facts relating to the breaches of Article 36(1)(b) in the cases and their potential significance.)

Mexico also mischaracterizes the cases of Mexicans Irineo Tristan Montoya, Mario Benjamin Murphy and Miguel Angel Flores, Mexico Memorial, paras. 141-147, in which clemency was also denied. Those mischaracterizations are addressed in the Compliance Declaration, para. 18 and Appendix 5, Annex 1. In any event, these cases also predated this Court's decision in *LaGrand*. The approach taken by the United States to cases involving breaches of Article 36 has changed significantly in the wake of *LaGrand*. Mexico's suggestion that clemency authorities "pay little or no heed to the Department of State", Mexico Memorial, heading of Chapter IV(B)(3)(d), para. 275, is belied by the facts. The experience since *LaGrand*

1. The Case of Javier Suarez Medina

7.24 Suarez Medina was one of several men who in December 1988 participated in the sale of cocaine to an undercover police officer posing as a cocaine customer. Suarez Medina planned, with his accomplices, to sell cocaine to the officer, kill him, and then re-sell the cocaine. He shot the undercover officer eight times with a semi-automatic machine gun when the sale did not go as planned. He confessed to the killing, was convicted, and was sentenced to capital punishment.

7.25 Three days after his conviction, Suarez Medina was visited by Mexican consular officers. The Mexican Legal Adviser later provided an affidavit in Suarez Medina's case that:

> Since verifying Mr. Suarez Medina's nationality in June 1989, Mexican consular officials have closely monitored the case, regularly visiting him in prison, and conferring closely with defense counsel. We have also invested substantial resources in his defense. For example, we have retained experienced counsel to assist his lawyer in developing legal claims. In addition, we have retained an investigator and two mental health experts . . . to develop mitigating evidence that was never introduced at the time of Mr. Suarez Medina's [original]

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in cases such as *Suarez Medina* and *Valdez Maltos* makes this abundantly clear.

trial[363].

7.26 Direct and collateral appeals were heard for more than ten years, following Mexico's first involvement, by all relevant courts. Given what Mexico itself characterizes as its extensive involvement in and support of the case, beginning in June 1989, and its retention of experienced counsel, it is indeed surprising that no claim raising the VCCR was advanced by counsel for Suarez Medina or by Mexico for over thirteen years – from June 1989 until August 2002[364]. Significantly, the State of Texas conceded that, had Suarez Medina raised the VCCR claim during his direct appeal or in state collateral *habeas corpus* proceedings over the intervening years "it is unlikely the Texas courts would have applied any procedural bar against reviewing the claim"[365]. The failure to raise this issue in direct or collateral appeals for thirteen years cannot fairly be characterized as excusable error, nor can Mexico complain that the defendant was not aware of the VCCR's requirements. If anything, the failure to raise the claim as a basis for demanding reversal of the conviction and exclusion of the confession reflects Mexico's understanding at the time (an understanding with which we emphatically agree) that the VCCR simply does not require such an extraordinary remedy.

7.27 Nevertheless, when Mexican authorities finally brought this case to the attention of the State Department in 1997[366], the Department contacted the Governor of Texas and the Texas Board of Pardons and Paroles, drawing their attention to the

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

[364] *See id.* at pp. 12-13, Annex 23, Exhibit 146.

[365] *Id.* at p. 12 n.14. *See also id.* at pp. 2-5, 12-13.

[366] *See* Mexico Memorial, Annex 25, p. A301. Mexican Embassy note 1682 was sent on 31 Oct. 1997, not 31 Oct. 1996, as erroneously referenced in the Diplomatic Note from the Department of State on page A316.

failure of information about consular notification and inviting consideration of that fact and this Court's decision in *LaGrand* during the clemency proceedings[367]. The Chairman of the Board met personally with Mexican Government officials on 8 August 2002, to discuss Suarez's petition and Mexico's views regarding the failure of consular notification. The substance of that meeting was shared with all Board members, who also received copies of written materials submitted by Mexico. The Board of Pardons and Paroles, by a divided vote, recommended against clemency and, as required by law, the Governor followed that recommendation. In a letter dated 14 August 2002, the Board Chairman explained the process used by the Board in considering the petition[368]. That letter leaves no doubt that the Board considered all of the information submitted by Mexico and Mr. Suarez and that it had full power to recommend that the Governor grant clemency if it concluded that such action was appropriate in light of the violation[369]. Given these

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[367] *See* Mexico Memorial, Annex 25, pp. A300-A303.

[368] Letter from Gerald Garrett, Chairman, State of Texas Board of Pardons and Paroles, to William H. Taft, IV, The Legal Adviser, United States Department of State, 14 Aug. 2001, Annex 23, Exhibit 195. Mexico did not include this letter in its Annexes. *See* Mexico Memorial, Annex 25, pp. A314-A315.

[369] Mexico is critical of the Texas clemency process, but the United States Supreme Court itself has recognized that the Texas system is fully capable of performing its customary function as a failsafe to correct judicial errors not otherwise addressable. *See Herrera v. Collins*, 506 U.S. 390, 411-416 (1993). Mexico's allegation that the Texas clemency process is "ineffective" rests almost entirely on a statistical showing that only a small proportion of petitions result in clemency being granted. Obviously the statistics Mexico offers can tell the Court nothing about the quality of the review and reconsideration provided. Moreover, Mexico's conclusion that the clemency process in Texas does not result in convictions being overturned or sentences being commuted *when this is warranted* is simply incorrect. Only recently the Texas Board of Pardons and Parole recommended unanimously, and the Governor granted, pardons to 35 persons, 31 of them African-Americans and one a Hispanic-American, where key evidence supporting the convictions was determined to be unreliable due to racially and ethnically motivated

facts, it is evident that the review and reconsideration process functioned here as it was intended. There is no basis to question the result.

2. The Case of Gerardo Valdez Maltos

7.28 The second case since the *LaGrand* decision in which a clemency petition was filed is that of Gerardo Valdez Maltos. In 1989, Valdez Maltos met Juan Barron at a bar and, after Barron indicated a sexual interest in him, invited Barron home. Motivated by a strong hatred of homosexuals, Valdez Maltos then subjected Barron to a variety of physical threats and psychological traumas, including the choice between immediate physical castration or death, before shooting Barron twice, pistol whipping him, slitting his throat, and then setting his body afire in a barbeque pit. This was a heinous hate crime to which Valdez Maltos admitted. At no point in any subsequent proceeding did he ever deny that he had killed Barron. Instead, Valdez Maltos offered an insanity defense based on his "religious delusions" about the Bible's teachings about homosexuality. His mental condition was the subject of expert testimony for both the prosecution and defense at trial. Valdez Maltos was convicted by a jury, and given a capital sentence. Direct and collateral appeals were heard for more than ten years by all relevant courts[370].

7.29 In April 2001 Valdez Maltos' family members advised the Mexican Consulate in El Paso of his situation. When the

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perjury. *See* Press Release, Office of the Governor, *Gov. Perry Grants Pardons to 35 Tulia Defendants* (22 Aug. 2003), Annex 23, Exhibit 147; Adam Liptak, "Texas Governor Pardons 35 Arrested in Tainted Sting," in *The New York Times* p. A7 (23 Aug. 2003), Annex 23, Exhibit 148; David Sedeño "35 Convicted in Tulia Busts are Pardoned," in *The Dallas Morning News* pp. 1A, 10A (23 Aug. 2003), Annex 23, Exhibit 149.

[370] *See Valdez v. Ward*, 219 F.3d 1222, 1227-1228 (10th Cir. 2000), Annex 23, Exhibit 150.

United States Department of State was sent a note from the Embassy of Mexico, there was an investigation and the Department concluded that there had been a breach of obligations under the VCCR with respect to Mr. Valdez Maltos[371]. The United States Legal Adviser wrote on 5 June to the Oklahoma Pardon and Parole Board, and on 6 June and 11 July to Oklahoma Governor Frank Keating, specifically drawing this breach of Article 36 to their attention and requesting that they give careful consideration to Mr. Valdez's pending clemency request, including the Article 36 breach and Mexico's representations on his behalf[372].

7.30 As Mexico itself concedes, "the Oklahoma Pardon and Parole Board recommended commutation [of Valdez Maltos' sentence to the Governor] after reviewing extensive evidence gathered with the assistance of Mexico consular officers"[373]. After a telephone discussion with Mexican President Vicente Fox Quesada, Governor Keating granted a thirty day stay of execution to allow himself time to consider the recommendation. In the interim, this Court issued its judgment in *LaGrand*. The Department of State's Legal Adviser wrote Governor Keating a second time on 11 July 2001, bringing the *LaGrand* decision to the Governor's attention and requesting that the Governor specifically consider whether the VCCR violation had any prejudicial effect on either Valdez Maltos' conviction or sentencing[374].

7.31 There can be no doubt that Governor Keating, "taking the decision in *LaGrand* into account", independently reviewed and reconsidered the conviction and sentence of Valdez

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[371] *See* Mexico Memorial, Annex 26, p. A340.
[372] *See* Mexico Memorial, Annex 26, pp. A332-A335, A356-A357.
[373] Mexico Memorial, para. 273.
[374] *See* Mexico Memorial, Annex 26, pp. A356-A357.

Maltos[375]. The Governor met with Valdez Maltos' defense attorneys and senior officials of the Mexican Government, including the Mexican Legal Adviser[376]. Based on a review of all the evidence, including the failure to give Valdez Maltos consular information, the Governor concluded that clemency was not warranted. The Mexican Memorial does its best to portray this decision as utterly capricious and contrary to incontestable facts. But the United States emphatically invites this Court's careful scrutiny of the Governor's letter to the President of Mexico explaining the basis of his decision to deny clemency[377]. That letter clearly demonstrates that the Governor's review was careful, probing, and thorough, including discussions with many interested parties on both sides of the issue, fully supported by the research capabilities of his legal staff, and that the Governor's decision represented what he understood to be the correct outcome based upon the facts and the relevant law. In particular, the Governor's letter makes plain that he took account of the violation of Article 36 in evaluating Valdez Maltos' clemency petition. Far from being evidence of dysfunction, the *Valdez Maltos* case shows clearly that the clemency process is a meaningful one that fully comports with the reasoning and principles that underlay this Court's judgment in *LaGrand*.

7.32 Moreover, Mexico's Annex entirely pretermits the history of the case subsequent to the clemency decision. On 17 August 2001, the Governor issued a second stay of execution in order to allow Mexico to consider and evaluate "legal and diplomatic alternatives available to them and Mr. Valdez [Maltos] in light of the novel legal issues presented"[378]. Valdez

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[375] Mexico Memorial, Annex 26, pp. A358-A359

[376] *See* Mexico Memorial, Annex 26, p. A359.

[377] *See* Mexico Memorial, Annex 26, pp. A358-A361.

[378] Governor of Oklahoma Executive Order 2001-28 (17 Aug. 2001), Annex 23, Exhibit 151.

Maltos then filed a second petition for post-conviction relief in the Oklahoma courts raising the VCCR breach, as well as other issues. That petition was granted, and the Oklahoma Court of Criminal Appeals entered an indefinite stay of execution, while observing that the case raised a "unique and serious matter involving novel legal issues and international law"[379]. Ultimately the court found the VCCR claim itself untimely, but it nonetheless vacated the capital sentence and ordered Valdez Maltos be given a new sentencing hearing in order to consider claims of other legal defects in his case, many of which correspond to the defects Mexico asserts resulted from breaches of the VCCR[380]. Valdez Maltos, at that new sentencing hearing, will be able to place in evidence the additional mitigating evidence that Mexico has helped develop, and it will be considered. Viewed thus, in the full light of its entire history, rather than as truncated by Mexico in its Memorial and Annex, the process followed by the courts and the executive branch of the State of Oklahoma unquestionably was careful, meaningful, fair and fully consistent with the principles set forth by this Court in *LaGrand.*

7.33 Consideration of the *Suarez Medina* and *Valdez Maltos* cases makes clear that the posture of the fifty-four cases involved in this proceeding, and the consequences (if any) of an Article 36 breach, are far more various and complex than Mexico has acknowledged in its Memorial. In the *Suarez Medina* case, neither the defendant nor the Mexican Government considered the VCCR breach to be of any legal significance for thirteen years, and they failed even to raise the claim as the case was actively appealed. If either Suarez

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[379] *Valdez v. State*, Order Staying Execution until further Order of this Court, No. PCD2001-1011, 2001 WL 171585, slip op. at 2 (Okla. Crim. App. Sept. 10, 2001), Annex 23, Exhibit 152.

[380] *See Valdez v. State*, 46 P.3d 703, 709-711 (Okla. Crim. App. 2002), Annex 23, Exhibit 58. Valdez Maltos' sentencing hearing is currently scheduled for Feb. 2004.

Medina or Mexico thought the defense had been prejudiced in any meaningful way by the breach of Article 36, they would have argued it forcefully to any court that would listen. But they did not. For thirteen years. In the *Valdez Maltos* case, the clemency process provided careful "review and reconsideration" of the conviction and sentence. In addition, although the court did not rest its opinion on Article 36, the court with the support of the Governor made sure the points raised in the clemency process were fully considered and addressed in other ways with the result that a remedial outcome – a new sentencing hearing – was ordered. Presumably Valdez Maltos will, at that new sentencing hearing, put into evidence the additional mitigating evidence that Mexico has helped develop, to bear on the sentencing determination.

7.34 Obviously Mexico would have preferred that clemency be granted in both cases. But considered fairly, Mexico can have no quarrel with the outcome in either case. The obligation sanctioned by *LaGrand* is review and reconsideration, not that the outcome of a case will necessarily be reversed. The United States, through appellate review and the clemency process, fully satisfied its obligations under the principles of *LaGrand* in the cases of *Suarez Medina* and *Valdez Maltos*. The statement of the Mexican Legal Adviser noted above[381] regarding Suarez Medina should be viewed by this Court as highly probative[382].

7.35 As the other cases finish with their judicial proceedings, whatever their outcome, clemency provides meaningful review

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[381] *See supra* at notes 363 and 376 and accompanying text.

[382] *See Military and Paramilitary Activities in and against Nicaragua, (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 41, para. 64 ("[S]tatements . . . emanating from high-ranking official political figures [of a Party before the Court] . . . are of particular probative value when they acknowledge facts or conduct unfavourable to the State represented by the person who made them. They may then be construed as a form of admission".).

and reconsideration taking into account the breaches of the VCCR.

CHAPTER VIII

IF THE COURT FINDS A BREACH OF ARTICLE 36(1), IT SHOULD APPLY THE SAME REMEDY HERE AS IT ORDERED IN *LAGRAND* – "REVIEW AND RECONSIDERATION" – AND SHOULD NOT GRANT MEXICO'S REQUESTS FOR *VACATUR*, EXCLUSION, ORDERS OF CESSATION AND GUARANTEES OF NON-REPETITION

8.1 The purpose of remedies, as this Court has repeatedly stated and recently reaffirmed, is to establish "the situation which would, in all probability, have existed if [the wrongful act] had not been committed"[383]. In fashioning a remedy for breach of the VCCR in the *LaGrand* case, the Court devised a remedy – review and reconsideration – that satisfies the purpose of reparations and is appropriate both to the nature of the obligation allegedly breached by the United States and to the respective rights and competences of the United States and Mexico. Mexico would have this Court set aside its judgment in *LaGrand* and substitute an inappropriate form of restitution that finds no basis in the VCCR and no antecedent in international law. Mexico would also have this Court reverse its decision that the commitment to improved compliance expressed by the United States, coupled with the "review and reconsideration" remedy, satisfied Germany's demands for guarantees against repetition. The Court should reject Mexico's proposals in both respects.

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

A. Mexico's Proposed Restitution Remedy Should be Rejected Because It Asserts a Form of Restitution Not Appropriate to the Circumstances of Individual Cases Involving Breaches of Article 36

8.2 In its Application, Mexico requests the Court to declare "that Mexico is . . . entitled to *restitutio in integrum*"[384]. In Mexico's view, this means that "the United States must restore the *status quo ante*, that is, reestablish 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 obligations"[385]. This request is further expounded in Mexico's Memorial, in which Mexico once again reiterates its demand for *restitutio in integrum*, which it now defines somewhat differently as: "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"[386].

8.3 Mexico's proposed application of *restitutio in integrum* is unprecedented and far-reaching when viewed against the customary contours of what is in any event an exceptional legal remedy. Mexico would have the Court declare that the United States is under the extraordinary obligation to vacate the convictions and sentences of all fifty-four Mexican nationals, to exclude in any subsequent legal proceedings any statements or confessions obtained prior to consular notification and assistance, to prevent the application of any procedural penalty for a defendant's failure to raise a known VCCR claim on a timely basis, to prevent the application of any law that would

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[384] Mexico Application, para. 281.
[385] Mexico Application, para. 281.
[386] Mexico Memorial, para. 407.

bar a United States court from providing a remedy for a VCCR breach, and to prevent the application of any law that would require an individualized showing of prejudice as a prerequisite to relief[387].

8.4 The Court should reject Mexico's misplaced attempt to apply a theoretical form of *restitutio in integrum* in a context for which it is not suited. While there may be cases – such as the return of property to its rightful owner – in which it may be appropriate for the Court to order what might be regarded as a return to the *status quo ante*[388], such a concept is not appropriate in the circumstances of this case. Indeed, the Court has never ordered any form of restitution nearly as far-reaching as that sought by Mexico[389]. Instead, the Court should adhere to the form of restitution that it found to be appropriate in the

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[387] *See* Mexico Memorial, para. 407. Mexico's request is based on the notion that Article 36 reflects human rights and fundamental due process rights. In Mexico's view, a breach of Article 36 constitutes a "denial of fundamental procedural rights" that renders the conviction and sentence "illegitimate" and requires *vacatur*. Mexico Memorial, para. 364. Mexico does not justify its proposed remedy on any other terms. Thus, Mexico's proposed remedy cannot be accepted once Mexico's human rights premise is determined to be without legal basis. *See supra* at Chapter VI.D.4.

[388] Only in exceptional circumstances – when there are certain necessary consequences of its articulation of the law – will the Court order a State to take a specific course of action. *See, e.g., The Temple of Preah Vihear, Merits, Judgment, I.C.J. Reports 1962*, pp. 36-37 (requiring the return of the Temple and any property taken from it). *See* the discussion *infra* at Chapter VIII.A.3 and accompanying footnotes.

[389] *Cf. United States Diplomatic and Consular Staff in Tehran, (United States of America v. Iran), Judgment, I.C.J. Reports 1980*, pp. 44-45, para. 95(3) (requiring the immediate release of the hostages); *LaGrand, Judgment*, para. 128(7) (requiring the United States "by means of its own choosing" to provide review and reconsideration of a conviction and sentence in the event of a breach of the VCCR); *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium), Merits, Judgment, I.C.J. Reports 2002*, para. 76 (requiring Belgium, "by means of its own choosing", to cancel the arrest warrant). *See* the discussion *infra* at Chapter VIII.A.3 and accompanying footnotes.

LaGrand case: that "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"[390].

1. Review and Reconsideration Satisfies the Purpose of Reparations and Strikes the Appropriate Balance of the Rights and Interests at Stake

8.5 In the *LaGrand* case, the Court imposed on the United States the requirement that it provide, by means of its own choosing, review and reconsideration, taking account of the breach of the VCCR, of convictions and sentences in cases in which German nationals have been sentenced to severe penalties without the requirements of Article 36(1)(b) having been respected. The Court's decision in *LaGrand* created for the first time a link between the consequences of a breach of a State's obligations under the VCCR and what had theretofore been regarded as the separate realm of convictions and sentences resulting from the operation of a State's municipal criminal justice systems.

8.6 The remedy provided by the Court in *LaGrand* is thus a far-reaching and unprecedented one. Its effects reach the very heart of the State's responsibility to its citizens to maintain public order. Moreover, by stating the review and reconsideration requirement as a prospective obligation of the United States with respect to cases in which a breach of the VCCR occurred, the Court departed from the particular facts before it relating to the LaGrand brothers to create, for the first time, a remedy of general and prospective application.

8.7 The remedy set forth by the Court in *LaGrand* fully satisfies the purposes for which remedies are provided. It

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

mandates the creation of a process, the precise form of which is left to the choice of the particular State, in which a conviction and sentence can be fully evaluated in light of any breach of Article 36. As *LaGrand* makes clear, such a remedy is all any State is entitled to. By contrast, Mexico would have the Court require the United States to abandon the determination in *LaGrand* in favor of imposition of an across-the-board remedy that would require automatic reversal of a conviction and sentence for every case in which a breach of the VCCR is alleged.

8.8 While Mexico challenges the Court's *LaGrand* remedy as inadequate, the United States instead regards *LaGrand* as itself constituting the limit of the remedy that is available to a State in respect of a breach of the VCCR. The remedy set forth in *LaGrand* also, as described below, strikes an appropriate balance between the rights at stake, taking into account the procedural nature of the obligations at issue under the VCCR and the substantive rights of a State with respect to the operation of its municipal criminal justice systems.

8.9 In the Commentaries to its Draft Articles on State Responsibility, the International Law Commission expressly addressed the application of restitution in the circumstances at issue in this case. The Commentary states:

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

> the exercise of the substantive powers of a State. Restitution in such cases should not give the injured State more than it would have been entitled to if the obligation had been performed.[391]

The Commentary then continues in a footnote:

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

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[391] International Law Commission, *Commentaries to the draft articles on Responsibility of States for internationally wrongful acts, fifty-third session, 2001*, Supplement No. 10 (A/56/10), art. 34, p. 236, para. 3 (emphasis added) (hereinafter, this document will be referred to as the "Commentaries"), Annex 23, Exhibit 153; *see also Report of the International Law Commission on the work of its forty-fifth Session, Draft articles of part two of the draft on State responsibility*, document A/48/10 in 1993 Yearbook of the International Commission, Vol. II, document A/CN.4/SER.A/1993/Add.1 (Part 2), p. 63, para. 3, Annex 23, Exhibit 154 ("[I]t would be theoretically and practically inaccurate to define restitution in kind as the unconditionally or invariably ideal or most suitable form of reparation to be resorted to in any case and under any circumstances. The most suitable remedy can only be determined in each instance with a view to achieving the most complete possible satisfaction of the injured State's interest . . . in full respect, of course, of the rights of the author State."); Ian Brownlie, *Principles of Public International Law*, p. 465 (1998), Annex 23, Exhibit 155 ("In many situations it is clear that a remedy which accommodates the internal competence of governments, while giving redress to those adversely affected, is to be preferred.").

limited character of the rights in issue.[392]

As the International Law Commission agreed, review and reconsideration is the appropriate remedy in VCCR cases given the respective natures of the rights and interests at issue: in this case, the interest of the United States in the fair, expeditious and orderly administration of justice; and the interest of Mexico in the performance of consular information and notification.

8.10 The United States, like all States, has a significant and abiding interest in the operation of its criminal justice systems in ways that respect due process, exonerate the innocent, convict and punish the guilty, deter the wicked, and award justice to the victim. The prompt and thorough investigation of crimes is the foundation of the system's effectiveness, and fairness is its touchstone. Mexico's proposed remedy would inappropriately put this system into abeyance. The system would have to be halted while waiting for a detained person to decide whether to ask for consular assistance and, if he or she does ask for it, to await further while the consular officer decides whether and how to respond, if at all[393].

8.11 States likewise have an interest in swift and public justice that minimizes the burden of new trials or sentencing hearings long after the event – a fact that Mexico unfairly trivializes when it asserts that *vacatur* of convictions and exclusion of evidence "would impose no burden here at all"[394]. In fact, the retrials of cases – where not rendered impossible due to the passage of time, the fading of memories, the decay of

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[392] *See* Commentaries, *supra* note 391 at art. 34, p. 236, para. 3 n.518, Annex 23, Exhibit 153.

[393] Mexico apparently argues that a receiving State may not interrogate a detainee who requests consular notification until after the consular officer has arrived so as to sit in on the questioning. *See* Mexico Memorial, para. 321. The VCCR contains no support for such a reading.

[394] Mexico Memorial, para. 389.

physical evidence and the expiry of witnesses – is difficult and expensive[395]. New trials are not undertaken lightly, and certainly not on account of errors that ultimately had no bearing on the fundamental fairness of the trial. They are tremendously traumatic to the victims and their families, who are compelled to relive the horrors of the crimes committed and to worry that those responsible might go free. They severely disturb the community's interest in law and order, in the punishment of the guilty, and in a sense of finality.

8.12 Moreover, the exclusion of reliable and probative evidence imposes a high societal cost, risking the acquittal of a guilty person, which would leave a serious crime unpunished, the rights of the victims unvindicated, and a dangerous criminal at large[396]. Yet these significant substantive interests would be

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[395] It bears reminding that trials in the United States require live testimony by in-court witnesses who are subject to sometimes intense cross-examination and whose credibility is assessed by the jury. Because of the nature of the lay jury system and the constitutional rights of confrontation, a retrial is a significant event that imposes a substantial burden on all parties.

[396] Frequently, the most reliable and probative evidence at a criminal trial will be the defendant's voluntary statement. To deny the prosecution the ability to introduce a confession that is not coerced, that is supported by sufficient detail to permit confidence in its truthfulness, that is taken in a manner that guarantees its voluntariness, and that meets other United States constitutional standards, would deprive the fact-finder of important evidence of guilt. Moreover, a suspect's statement may be more than just a personal admission: it may provide additional evidentiary leads that enable the authorities to locate the corpses of missing victims (as in #38 Medellin Rojas, #39 Moreno Ramos, #41 Ramírez Cardenas, #47 Perez Gutierrez, and #54 Reyes Carrerra) or the murder weapon (as in #39 Moreno Ramos). A suspect's statement also may identify accomplices or witnesses and it can supply details that enable the authorities to find additional probative and corroborating evidence. Mexico's proposed rule would exclude all of this derivative evidence, placing a significant additional burden on the criminal justice system. An exclusionary rule also exacts a uniquely high price in the United States justice system because, unlike in most States, the government cannot appeal an acquittal, even if based on a legal mistake by the fact finder.

overridden by the remedy Mexico proposes.

8.13 In addition, the remedy Mexico proposes would ensure that foreign nationals receive both different and better treatment, subject to differing rules of criminal procedure, before the courts of the receiving State than do that State's own citizens[397]. This was not what the drafters intended when they wrote Article 36.

8.14 Finally, the United States, like all States, has an abiding interest in the protection of its sovereignty and the sovereignty of the fifty states that comprise it. Amongst the most solemn and important aspects of sovereignty is punishment of individuals for violations of law. The intrusive remedies that Mexico seeks would strike at the very heart of this sovereignty and, for this reason alone, cannot be countenanced. It is in recognition of this important – indeed, in the international arena, unrivaled – interest, that this Court adopted the narrowly tailored remedy that "the United States of America, *by means of its own choosing*, shall allow the review and reconsideration of the conviction and sentence . . ."[398].

8.15 Balanced against these considerations are, the United States recognizes, the important protections of Article 36.

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[397] Article 5(a) of the VCCR states that consular functions consist in "protecting in the receiving State the interests of the sending State and of its nationals . . . within the limits permitted by international law". International law does not establish national treatment as the standard of protection. While international law permits a State to grant national or most favored nation treatment to foreign nationals, the VCCR provides for neither. While bilateral consular conventions may provide enhanced consular protection for dual nationals, as a number of protocols to consular treaties between the United States and Eastern European countries did during the Cold War, there is no consular treaty between the United States and any other country that would give aliens greater rights than United States nationals in criminal cases. *See supra* note 330.

[398] *LaGrand, Judgment*, para. 125(7) (emphasis added).

Informing and notifying are means to an end – allowing the consular officer to provide assistance if requested and if the consular officer elects to do so. The fact that Mexico has elected to give extraordinary assistance to its nationals in capital cases – and the United States in no way questions this obvious fact – is salutary but does not alter the limited nature of the provisions at issue.

8.16 Article 36 requirements are procedural, not substantive, and they have no necessary implications for fundamental due process[399]. Notification merely informs the consular officer of the detention; it triggers no obligation to assist and no standards for appropriate assistance. Sending States, in fact, provide wildly varying levels of assistance, if any. Even when he or she offers assistance, the role of the consular officer is in practice often limited by the receiving State. Consular officers typically cannot act as attorneys, and States impose a wide variety of limitations on consular visits. They do not have an unrestricted right of access to detainees, and in some States may not be allowed to meet privately or to discuss a case with a detainee. States Parties to the VCCR (and all other States) accordingly must be prepared and able to conduct criminal proceedings – and to guarantee fair trials – independent of consular assistance. Article 36's effect, therefore, is in no way determinative of the fairness of criminal trials for foreign nationals.

8.17 Mexico's proposed remedy fails to take into consideration the wrongful act alleged and the important State interests impinged by its proposed remedy. By contrast, the Court appropriately balanced the nature of the primary obligation at issue and the significant State interests at stake when it settled upon review and reconsideration as the appropriate remedy in *LaGrand*.

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[399] *See* Weigend Declaration, para. 36, Annex 3.

2. Mexico's Proposed Remedy Is Inconsistent with the Requirement of a Causal Link Between any Breach Proven and the Harm Resulting

8.18 No relief would be appropriate in any case in which the same legal outcome actually reached would have resulted absent the breach[400]. In such cases, as the International Law Commission's Special Rapporteur on State Responsibility, Professor Crawford, has explained, "the notion of a *general* return to the earlier situation may be excluded"[401]. Indeed, he has aptly observed that, in the particular context of cases involving capital sentences where there was a breach of the VCCR:

> [T]he relationship between the breach of the obligation of consular notification and the

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[400] *See* International Law Commission, *Draft articles on Responsibility of States for internationally wrongful acts adopted by the International Law Commission at its 53rd session*, Supplement No. 10 (A/56/10), 2001, Nov., Supplement No. 10 (A/56/10), art. 31(1), Annex 23, Exhibit 65, ("The responsible State is under an obligation to make full reparation for *the injury caused* by the internationally wrongful act." (emphasis added)). *See also* Commentaries, *supra* note 391 at art. 31, p. 227, para. 9 ("the subject matter of reparation is, globally, the injury resulting from an ascribable to the wrongful act, rather than any and all consequences flowing from an internationally wrongful act").

[401] International Law Commission, *Third Report on State Responsibility by Mr. James Crawford, Special Rapporteur, Addendum*, document A/CN.4/507/Add.1, 15 June 2001, para. 142 (emphasis in original), Annex 23, Exhibit 156; *see also* Christian J. Tams, "Consular Assistance and Rights and Remedies: Comments on the ICJ's Judgment in the *LaGrand* Case" in *European Journal of International Law*, Vol. 13, No. 5, 2002, Nov., n.74 and accompanying text *available at* http://www.ejil.oupjournals.org, Annex 23, Exhibit 157 ("[I]t would have gone too far had the Court [in *LaGrand*] found that all judgments impaired by the failure to notify the defendant . . . per se had to be reversed, irrespective of whether the absence of consular assistance had actually had a negative impact on the defence of the foreigner".).

> conviction of the accused person was indirect and contingent. It could well have been the case that the subsequent trial was entirely proper and fair and the failure of notification had no effect on the conviction. . . . Only if a sufficient causal connection could be established between the United States' failure to notify and the outcome of the trial could the question of restitution arise at all.[402]

8.19 As President Shi stated in his Separate Opinion in *LaGrand*, the review and reconsideration remedy allows measures to be taken only "to prevent injustice or an error in conviction or sentencing"[403]. The determination whether the breach warrants changing the conviction or sentence depends critically on the facts of each particular case, the application of relevant municipal law, and other factors.

3. Review and Reconsideration is Consistent with this Court's Conception of its Own Role and the Decisions of Other International Courts and Tribunals

8.20 A division of competences characterizes adjudication before the Court. It falls to the Court to resolve particular cases. In the event the Court determines that a party's act was

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[402] International Law Commission, *Third Report on State Responsibility by Mr. James Crawford, Special Rapporteur, Addendum*, document A/CN.4/507/Add.1, 15 June 2001, para. 141, Annex 23, Exhibit 156; *accord* James Crawford "Revising the Draft Articles on State Responsibility", in *European Journal of International Law*, Vol. 10, No. 2, 1999, p. 446, Annex 23, Exhibit 158 ("For the issue of restitution even to arise in *Breard* it would have been necessary to show that the procedural failure had direct consequences in terms of the verdict and sentence.") As the United States has made clear in Chapter VII.D-E, *supra*, Mexico has failed to show that the outcome of any of the cases in which there may have been a breach was actually affected by such a breach of Article 36.

[403] *LaGrand, Judgment*, para. 17 (Separate Opinion of Vice-President Shi).

unlawful and requires a remedy, it then falls to that party to implement the Court's decision in the context of its own system. In many cases, there will be multiple ways in which parties could appropriately give effect to the Court's decision. In such circumstances, the Court has consistently declined to require a particular means of compliance. As the Court held in the *Haya de la Torre* case, the various choices regarding the means of implementing the Court's decision "are conditioned by facts and by possibilities which, to a very large extent, the Parties alone are in a position to appreciate. A choice amongst them could not be based on legal considerations, but only on considerations of practicability or of political expediency; it is not part of the Court's judicial function to make such a choice"[404]. This division of competences reflects the understanding that States, as sovereigns, have the right to conduct their internal affairs as they choose, provided they comply with the law.

8.21 For the same reasons, the Court has only rarely ordered states to take specific actions and has never made orders as broad as those Mexico requests here. In this regard, it bears recalling that the United States specifically sought, in its Application and in its Submission in the *Tehran Hostages* case, an order from this Court directing Iran to submit to its authorities for prosecution under municipal law or to extradite to the United States the persons responsible for the breach of the VCCR[405]. Yet, this Court denied this request without

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[404] *Haya de la Torre, Judgment, I.C.J. Reports 1951*, p. 79; *see also Northern Cameroons, Preliminary Objections, Judgment, I.C.J. Reports 1963*, p. 37 ("As the Court said in the *Haya de la Torre* case, it cannot concern itself with the choice among various practical steps which a State may take to comply with a judgment.").

[405] *See United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980*, p. 7, para. 8.

comment[406], evidently because it did not consider its functions to include what would have amounted to dictating to a State and its courts whether and how to conduct criminal proceedings. Even in those few cases in which the Court did effectively direct a State to take a particular action, it did not specify the means by which the State was to implement the judgment[407].

8.22 The Court issues its judgments on the assumption that states will comply with these judgments in good faith. As Professor Rosenne has explained, that principle affords "the decision-making authorities a fair degree of freedom of action in interpreting and applying the terms of the treaty-obligation in a concrete case"[408].

8.23 The approach reflected in the principles discussed above stems from the Court's abiding respect for the sovereign right of States to decide the specific means by which to comply with their international legal obligations, once they have been determined. The orders Mexico requests would be entirely at odds with this approach and would represent an unjustified,

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[406] *See United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980*, pp. 43-44, para. 92 and pp. 44-45, para. 95.

[407] *See Temple of Preah Vihear, Merits, Judgment, I.C.J. Reports 1962*, pp. 36-37; *United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980*, pp. 44-45, para. 95. This approach enables the Court to avoid issuing orders that are so specific as to be highly onerous for a State to enforce in its municipal legal system, where its authorities may face separation of powers, judicial independence, or other constitutional constraints. A degree of flexibility in the implementation of a judgment avoids forcing States into a destructive choice between adherence to their municipal constraints, which are often of a constitutional character, and respect for their international obligations. It serves to improve compliance with the Court's orders.

[408] Shabtai Rosenne, *Developments in the Law of Treaties 1945-1986*, pp. 176-177 (1989), Annex 23, Exhibit 159; *accord* Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, p. 136 (1953), Annex 23, Exhibit 103 (it follows "from the general presumption of good faith that abuses of right cannot be presumed").

unwise, and ultimately unacceptable intrusion into the United States criminal justice system. The Court's jurisprudence in this area is consistent with the jurisprudence of other courts and tribunals[409]. Such deference to a State's internal mechanisms is especially important in the context of municipal judicial proceedings, where the considerations of sovereignty are buttressed by principles of judicial independence. So, while an international tribunal may have the competence to determine that a municipal judicial proceeding has breached international law (which would implicate the international responsibility of the State), it will abstain from the annulment of a judicial decision (which would implicate a State's domestic legal capabilities) in order to allow the State to choose the appropriate means to vindicate the Court's holding[410].

8.24 Citing decisions of the Inter-American Court of Human Rights and the *Martini* case, Mexico has argued that "[i]t is well-established that the restoration of the *status quo ante* may

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[409] Even the Inter-American Court of Human Rights, which has an unusually broad remedial authority under Article 63(1) of the American Convention on Human Rights, *see* Dinah Shelton, *Remedies in International Human Rights Law*, pp. 172, 295 (1999), Annex 23, Exhibit 160, has recognized that "the rule of *in integrum restitutio* refers to one way in which the effect of an international unlawful act *may* be redressed, but it is not the only way in which it *must* be redressed, for in certain cases such reparation may not be possible, sufficient or appropriate". I/A Court H.R., *Aloeboetoe et al. Case. Reparations (Art. 63(1) of the American Convention on Human Rights)*, Judgment of Sept. 10. 1993. Series C No. 15, para. 49 (emphasis in the original), Annex 23, Exhibit 161.

[410] *See Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I.C.J. Reports 1999*, p. 90, para. 67(4) ("[T]he Government of Malaysia has the obligation to communicate this Advisory Opinion to the Malaysian courts, in order that Malaysia's international obligations be given effect and [the Special Rapporteur's] immunity be respected."). Thus, this Court left it to the Government of Malaysia and its courts to determine the appropriate means to give effect to the Court's holding.

consist of the *vacatur* of a judicial decision"[411]. Such an assertion overstates the case. As already noted[412], the American Convention on Human Rights provides remedies well in excess of general international law[413], and so the decisions of the Inter-American Court, even in a case related to the subject matter of this case, do not enlighten the general rule. Nor did the *Martini* case itself[414], the only decision cited by commentators to support this proposition, require either the restoration of the *status quo ante* or the vacating of a judicial decision. There the Tribunal found that the decision of the Federal Court of Cassation, which required the Martini Company to pay the Government of Venezuela certain amounts for the violation of a concession contract, was a "manifest injustice". Though the Company never made the payment, the "obligations [continued to] exist[] in law", and, therefore, they had to be "annulled" since "an illegal act has been committed . . . [and] the consequences of the illegal act must be effaced"[415]. Consequently, the Tribunal decided, "the Venezuelan Government is bound to recognize, as a right of reparation, the annulment of the obligations of payment imposed upon the

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[411] *See* Mexico Memorial, para. 365. *See generally id.* at paras. 364-373. Mexico also cites the writings of Professor John Quigley, Mexico Memorial, para. 372, who "has been counsel to the Government of Mexico in its role as amicus curiae in U.S. court cases on consular access". John Quigley, "*LaGrand*: A Challenge to the U.S. Judiciary", in *Yale Journal of International Law*, Vol. 27, No. 2, 2002, p. 435 n.23, Annex 23, Exhibit 162.

[412] *See supra* note 409.

[413] American Convention on Human Rights, 22 Nov. 1969, arts. 10, 25, 63, O.A.S. Treaty Series No. 36, at 1, 1144 U.N.T.S. 123, Annex 23, Exhibit 107.

[414] *Affaire Martini (Italy v. Venezuela), 2 R.I.A.A. 976, 1930*, Annex 23, Exhibit 163.

[415] "Judicial Decisions", in *American Journal of International Law*, Vol. 25, No. 3, 1931, July, pp. 584-85 (providing an English translation of the arbitral award in the *Martini* case), Annex 23, Exhibit 164; *Affaire Martini (Italy v. Venezuela), 2 R.I.A.A. 976, 1930*, p. 1002, Annex 23, Exhibit 163 *(« un acte illicite a été commis . . . [et] les conséquences de l'acte illicite doivent être effacées ».)*.

Martini Company"[416]. Notably, the Tribunal did not require Venezuela to vacate the judicial decision, but rather to annul, by means of its own choosing, the underlying legal obligations owed the Government by the Martini Company by virtue of the decision[417].

8.25 Mexico's remedy, on the other hand, asks the Court to direct the United States to take specific action, action that necessarily involves the legislatures of the fifty states and/or the United States Congress. Such a remedy under these circumstances is unprecedented and should be rejected out of hand. The few cases granting such remedies have done so only where the *compromis* or treaty explicitly conferred such jurisdiction on the tribunal[418]. That is not the case here.

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[416] "Judicial Decisions", in *American Journal of International Law*, Vol. 25, No. 3, 1931, July, pp. 585 (providing an English translation of the arbitral award in the *Martini* case), Annex 23, Exhibit 164; *Affaire Martini (Italy v. Venezuela), 2 R.I.A.A. 976, 1930*, p. 1002, Annex 23, Exhibit 163 («le Gouvernement Vénézuélien est tenu de reconnaître, à titre de réparation, l'annulation des obligations de paiement, imposées à la Maison Martini».)

[417] To accomplish this objective, the Government of Venezuela need not have gone into court or have declared the decision invalid. There is no indication that the Government did so or that this is what the Tribunal envisioned. Indeed, since the debt was owed to the Government, it could have issued a statement or edict (or could have asked the Venezuelan legislature to pass a law) renouncing the debt. Though not referring to the *Martini* case, Professor Christian Tomuschat recognized this distinction in the discussion of restitution in the International Law Commission. He noted that "[i]n the case of a judgment inconsistent with international law, the State concerned could be under an obligation to enforce the international obligation, but it might not be duty bound to set aside the judgment itself". 1989 Yearbook of the International Law Commission, Vol. I, Summary records of the meetings of the forty-first session, document A/CN.4/SER.A/1989 (2104th Meeting, 18 May 1989), pp. 54, para. 15, Annex 23, Exhibit 165.

[418] *See* Martin Mennecke & Christian Tams, "The Right to Consular Assistance under International Law: The *LaGrand Case* Before the International Court of Justice", in 1999 *German Yearbook of International Law*, Vol. 42, 2000, p. 233 n.189, Annex 23, Exhibit 166 (citing Helmut

8.26 In keeping with the practice of international courts and tribunals, the Court's review and reconsideration remedy recognizes its own proper role, allowing the United States to implement the Court's decision "by means of its own choosing". In this way, the Court does not act as a court of criminal appeals and avoids the unprecedented step of requiring the vacating of judicial decisions of municipal courts.

4. There is No Legal Basis for the Automatic and Categorical Exclusionary Rule Mexico Has Demanded

8.27 Just as it would be unprecedented for the Court to order the *vacatur* of the convictions and sentences at issue in this case, so too it would be unprecedented (and without legal foundation) for this Court to decide that United States municipal courts should exclude from evidence "in any subsequent criminal proceedings against the [Mexican] nationals, statements and confessions obtained prior to notification to the national of his right to consular assistance"[419]. Such an order would amount to judicial legislation, completely at odds with fundamental notions of State sovereignty and judicial independence. It would have no basis in customary international law and no support whatsoever in the text of the VCCR.

8.28 Mexico asserts that the exclusionary rule is a general principle of law, since it "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"[420].

Urbanek, "Die Unrechtsfolgen bei einem völkerrechtsverletzenden Urteil: Seine Behandlung durch internationale Gerichte", 11 *Österreichische Zeitschrift für Öffentliches Recht* 70, 91-117 (1961)).

[419] Mexico Memorial, para. 374.

[420] Mexico Memorial, para. 375.

Mexico contends on this basis that the Court should order the exclusion of all statements and confessions made by the defendants to officials prior to being provided with consular information[421]. Mexico has overstated the pervasiveness of the exclusionary rule in legal systems throughout the world, has not taken into account its varying forms, and ignores the fact that it has never been used to mandate exclusion of statements made by a defendant prior to receiving consular information, as Mexico demands.

8.29 While it is true that some legal systems have begun, in the last twenty-five years, to use exclusionary rules in different ways and for varying purposes, the practice is not by any means widespread or consistent enough to be considered a "general principle of law"[422]. As recently as the 1970s, the automatic exclusionary rule adopted by the United States Supreme Court was seen as a "peculiarity"[423]. Other forms of an exclusionary rule have since been adopted in other jurisdictions. But even considering the varying forms of exclusion collectively, exclusion certainly does not constitute the majority position[424].

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[421] Mexico Memorial, para. 380.

[422] *See* Weingend Declaration, paras. 10-11, Annex 3.

[423] John H. Langbein, *Comparative Criminal Procedure: Germany*, p. 69 (1977), Annex 23, Exhibit 167 ("The constitutional exclusionary rules are for the most part an American peculiarity. Illegally obtained evidence is generally admitted not only in Germany and other continental systems, but also in England and the Commonwealth Systems."). Professor Damaška confirms that "[o]nly a small number of continental countries have adopted express legislative provisions rejecting illegally obtained testimony of the defendant." Mirjan Damaška, "Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study", in *University of Pennsylvania Law Review*, Vol. 121, 1973, p. 522 (1973), Annex 23, Exhibit 168. He concluded that the extreme reluctance of civil law systems to adopt exclusionary rules stemmed "largely on their fears that 'obviously' guilty defendants may finally have to be acquitted. This to them would appear intolerable". *Id.* at 524.

[424] *See* Hans Lensing, "General Comments", in *Criminal Procedure: A Worldwide Study*, p. 428 (Craig M. Bradley ed., 1999), Annex 23, Exhibit

As Professor Weigend explains, "Exclusion of evidence as a sanction for employing illegal means in obtaining it has some appeal for legal systems adhering to the adversary mode of adjudicating cases"[425]. In legal systems using the "inquisitorial"mode for fact-finding, however, "it is the court's responsibility to find the truth regardless of the activity or passivity of the prosecution and defense"[426]. In such systems, depriving the court of relevant information by excluding evidence "makes little sense"[427]. The majority of legal systems "do not recognize a strict 'automatic' exclusionary rule"[428]. Rather, they "tend to generally admit relevant evidence even if it was obtained in violation of a legal rule, but exclude evidence which is either inherently unreliable . . . or undesirable"[429].

8.30 Furthermore, the purposes of these rules differ. In the United States, the exclusionary principle is in large part viewed as a prophylactic judicial remedy designed to deter Constitutional violations[430]. Exclusionary rules will serve other

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170 (noting that the "U.S. system seems the most rigid system in as far as unlawfully obtained evidence must be excluded . . . . In other systems, the court has some discretion whether or not to admit illegally obtained evidence, depending on the rules violated (France, Germany) or on considerations of fairness and integrity (Canada, England and Wales, South Africa)"); Weigend Declaration, para. 16, Annex 3 ("Turning to the general concept of excluding illegally obtained evidence, Mexico again claims universal recognition for what is in effect a minority position".).

[425] Weigend Declaration, para. 16, Annex 3.

[426] Weigend Declaration, para. 16, Annex 3.

[427] Weigend Declaration, para. 16, Annex 3.

[428] Weigend Declaration, para. 17, Annex 3.

[429] As Professor Weigend explains, there is also the concept of "nullification", which provides for the exclusion of evidence, but is usually "limited to procedural faults especially designated by statute as leading to nullification, violations of fundamental rights, and/or violations causing prejudice to a party". Weigend Declaration, para. 15 (footnotes omitted), Annex 3.

[430] *United States v. Leon*, 468 U.S. 897, 906 (1984), Annex 23, Exhibit 171. The Declaration of Assistant Attorney General Christopher A. Wray explains

purposes in other criminal courts. The International Criminal Tribunal for the Former Yugoslavia and the International Criminal Court, for example, exclude evidence "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"[431]. Statements made without consular information "would undoubtedly be admitted" under this standard[432].

8.31 Mexico has failed to point to even a single instance in

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the operation of the exclusionary rule in United States courts. *See* Criminal Justice Declaration, paras. 16-19, Annex 7. The rule exacts high societal costs, as it may preclude the jury's hearing and taking into account highly relevant and reliable evidence of criminality. Because an "unbending application of the exclusionary sanction to enforce ideals of governmental rectitude would impede unacceptably the truth-finding function of judge and jury", *United States v. Payner*, 447 U.S. 727, 734 (1980), Annex 23, Exhibit 172, the Supreme Court has "restricted" application of the exclusionary rule "to those areas where its remedial objectives are most efficaciously served". *Id.* (citations omitted). Mexico disregards the fact that the essential touchstone of the United States exclusionary rule is the commission of a *constitutional* violation. Absent a constitutional violation or an express statutory requirement of exclusion, the courts do not exclude evidence to deter violations of statutes, procedural rules, or regulations. *See United States v. Caceres*, 440 U.S. 741, 754-755 (1979), Annex 23, Exhibit 173. Because treaties are regarded as the equivalent of a federal statute (*see Reid v. Covert*, 354 U.S. 1, 18 (1957) (plurality opinion), Annex 23, Exhibit 174), and because Article 36 does not expressly mandate the exclusion of evidence for the violation of the obligations it imposes, United States courts have consistently refused to require the suppression of statements made by detained foreign nationals prior to their receipt of information concerning consular notification. *See supra* at note 286 and accompanying text.

[431] International Tribunal for the Prosecution of Persons Responsible for Serious Violations of Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, Rules of Procedure and Evidence, rule 95; Rome Statute of the International Criminal Court, article 69(7) (further limits inadmissibility to violation of the Rome Statute or of "internationally recognized human rights").

[432] Weigend Declaration, para. 18, Annex 3.

which any national court or any national legislature has concluded that the automatic exclusion of all statements and confessions made by an accused to the authorities prior to receipt of consular information is an appropriate remedy for a breach of Article 36, whatever the purpose of their rule. Not one. In fact, the only area of consensus among the limited number of States that have adopted an exclusionary rule is in applying the rule as a remedy for involuntary confessions[433], which cannot be equated to a breach of Article 36. Clearly State practice does not indicate the emergence of new customary international law, contrary to Mexico's assertion[434].

8.32 Cases from the courts of other jurisdictions cited by Mexico do not, in fact, support Mexico's allegations[435]. In Canada, in a case precisely on point, a trial judge admitted statements made by the accused – even though the police failed to give him consular information – because the accused could not prove that his "trial would be unfair if the . . . utterances . . . were admissible"[436]. In Germany "courts tend to admit evidence obtained through illegal searches"[437] and, in point of

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[433] Craig M. Bradley, "*Mapp* Goes Abroad", in *Case Western Reserve Law Review*, Vol. 52, 2001, p. 376 (2001), Annex 23, Exhibit 179 ("On one point, all countries are in agreement, at least in theory: involuntary confessions must be excluded. Beyond that, . . . while evidentiary exclusion due to police misconduct frequently occurs, the rationales and the rigor of exclusionary practices vary greatly".)

[434] Weigend Declaration, paras. 5-21, 36, Annex 3; State Practice Declaration, para. 41, Annex 4.

[435] *See, e.g.*, J.R. Spencer, "Evidence", in *European Criminal Procedures*, pp. 602-610 (M. Delmas-Marty & J.R. Spencer eds., 2002), Annex 23, Exhibit 180.

[436] *R. v. Partak*, [2001] 160 C.C.C. (3d) 553, 570, Annex 23, Exhibit 127.

[437] Thomas Weigend, "Criminal Procedures: Comparative Aspects", in *Encyclopedia of Crime and Justice*, Vol. 1, p. 447 (J. Dressler ed., 2002), Annex 23, Exhibit 169; *see also* Craig M. Bradley, "The Exclusionary Rule in Germany" in *Harvard Law Review*, Vol. 96, No. 5, 1983, Mar., p. 1064, Annex 23, Exhibit 181 ("The German rule, for example, is less stringent than the American rule in excluding evidence derived from improper searches of

fact "[t]here is no general exclusionary rule that would make illegally obtained evidence inadmissible"[438].

8.33 In particular, Mexico's emphasis on its own newly adopted exclusionary rule is highly misleading in this regard[439]. Mexican courts have upheld the introduction of coerced[440] or otherwise compromised confessions[441] despite the advent of certain constitutional guarantees. Moreover, the significance of the rule as articulated by Mexico is grossly overblown since there are numerous instances in which exclusionary protections are utterly lacking in Mexico. In particular, one notes the total absence of reported cases that would automatically bar evidence obtained via arbitrary detention[442] and, more relevant to this case, that would automatically exclude evidence obtained against a non-Mexican defendant where his or her consulate was not notified pursuant to law[443]. The meager protection offered by Mexico's rule flatly undermines its effort to equate a general exclusionary principle with common State practice.

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the home, and the failure to give *Miranda*-type warnings to suspects generally will not result in exclusion in Germany.").

[438] Thomas Weigend, "Germany", in *Criminal Procedure: A Worldwide Study*, p. 195 (Craig M. Bradley ed., 1999), Annex 23, Exhibit 182.

[439] *See* Mexico Memorial, para. 376, n.459.

[440] *See* Lawyers Committee for Human Rights, *Legalized Injustice: Mexican Criminal Procedure and Human Rights*, p. 118 (2001), Annex 23, Exhibit 200 (noting that "[c]onfessions obtained under coercion are frequently used to convict defendants" and urging the adoption of legislative and other measures to require the express exclusion of evidence obtained through coercive means).

[441] *See id.* at p. 31 (Mexican courts continue to follow a Mexican Supreme Court holding "that evidence establishing the arbitrary detention of a suspect does not require a finding that the suspect's confession was rendered involuntarily"); Zamora Pierce Declaration, paras. 21-22, Annex 5.

[442] *See id.*

[443] *See* Zamora-Pierce Declaration, para. 25, Annex 5; Richards Declaration, para. 13, Annex 6.

8.34 In short, the exclusionary rule Mexico proposes is not a general principle of law within the meaning of the Court's Statute. There is no legal basis for this Court to adopt it.

B. Mexico is not Entitled to the Order of Cessation and Guarantees of Non-Repetition that it Demands

8.35 In *LaGrand*, the Court held that the commitment to improved compliance expressed by the United States, coupled with the "review and reconsideration" remedy, satisfied Germany's demands for guarantees of non-repetition[444].

8.36 Mexico submits that "the Court can no longer accept as adequate the assurances provided in *LaGrand*"[445]. Yet the United States has demonstrated that its efforts to improve the conveyance of information about consular notification are continuing unabated and are achieving tangible results. Mexico asserts that the remedy ordered in *LaGrand* has "proven ineffective to prevent the regular and continuing violation by its competent authorities of consular notification and assistance rights guaranteed by Article 36"[446]. However, Mexico's Memorial wholly fails to establish a "regular and continuing" pattern of breaches of Article 36 in the wake of *LaGrand*, nor could it, given the extraordinary lengths to which the United States has gone to implement this Court's directives. As the Court noted in *LaGrand*, "no State could give [] a guarantee [that there will never again be a failure to observe the obligation of notification under Article 36 of the VCCR]"[447]. Yet Mexico seizes upon isolated cases alleging such failure in its efforts to overturn the Court's judgment in *LaGrand*. Moreover, Mexico has failed utterly to prove its claim that the means that the

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[444] *See LaGrand, Judgment*, paras. 121-125.
[445] Mexico Memorial, para. 404.
[446] Mexico Memorial, para. 393.
[447] *LaGrand, Judgment*, para. 124.

United States has chosen to carry out the review and reconsideration remedy are inadequate[448]. Reconsideration and review, as implemented by the United States, generates meaningful outcomes justified by the underlying facts of particular cases.

8.37 The commitment of the United States to ensuring aggressive implementation of its obligations under the VCCR admits of no doubt. Since *LaGrand*, the United States has worked tirelessly to improve its compliance[449], and its efforts are bearing fruit[450]. This manifest commitment more than satisfies Mexico's demand for cessation and guarantees of non-repetition. Mexico has not proved that the review and reconsideration mechanism does not function appropriately[451], and, in fact, it not only meets but exceeds the efforts this Court specifically endorsed in *LaGrand*[452]. The Court should reject Mexico's proposed radical remedy in favor of the balanced remedy it adopted in *LaGrand*.

8.38 More broadly, however, the order of cessation and guarantees of non-repetition sought by Mexico should be rejected because of its own defects. Mexico would have the Court dictate to the United States that it cease applying – and also guarantee that it would in fact not apply – a wide variety of fully proper municipal legal doctrines and decisions, the combined scope of which is staggering[453]. Such an order would

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[448] Mexico Memorial, para. 397.

[449] *See supra* at Chapter II.D and Chapter VII.E.

[450] *See supra* at Chapter II.D and Chapter VII.E.

[451] *See supra* at Chapter VII.D-E.

[452] *See LaGrand, Judgment*, paras. 121-124.

[453] Mexico's broad order of cessation would have the Court prohibit not only "*any* procedural penalty for a Mexican national's failure to timely 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", but also "*any* municipal

not only be unprecedented in international law and practice, it would impose upon the United States obligations beyond those that it undertook when it ratified the VCCR. It would also be deeply intrusive into the criminal justice system of the United States[454] and would have far-reaching and intrusive consequences for State sovereignty that would press the Court into areas outside the scope of its appropriate jurisdiction and judicial function. For all these reasons, Mexico's proposed order of cessation and guarantees of non-repetition should be rejected.

1. Mexico's Request for an Order of Cessation has No Basis in International Law

8.39 Mexico first demands an order of cessation of the alleged breaches of Article 36, including the issuance of an injunction, which would prohibit the United States from applying a wide variety of municipal law doctrines. This kind of order would be an unprecedented, unwise, and unjustified intrusion into the criminal justice system of the United States. Indeed, it is telling that Germany did not request such an order in *LaGrand*[455], nor did Paraguay in *Breard*[456].

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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 "*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". Mexico Memorial, para. 407(2)(c) (emphasis added).

[454] Respect for the operation of municipal legal systems is especially necessary and appropriate in the field of criminal law, which is of particular significance to the internal order and the security of the State and its people. *See Breard*, p. 263 (Declaration of Judge Koroma) (stating the particular need for "respect for the sovereignty of a State in relation to its criminal justice system".).

[455] *See LaGrand, Judgment*, para. 11.

[456] *See Breard*, para. 5.

8.40 To the extent that there have been breaches of Article 36 by the United States, they have been unintentional and are not continuing in character. Under the Court's jurisprudence, express orders of cessation are granted only in the most exceptional of cases[457]. The very nature of these few exceptional cases, including the continuing acts involved, are so radically different from that of the present case as to make clear that an order of cessation would not be appropriate here.

8.41 Recognizing the exceptional nature of requiring cessation as a judicial remedy, international law provides (and Mexico concedes) that cessation is only appropriate in situations where "the wrongful act has a continuing character"[458]. But the "pattern of non-compliance" that Mexico alleges would not come within the generally accepted definition of a "continuing act"[459]. Indeed, Mexico must manufacture the

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[457] *See, e.g., United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980*, p. 44, para. 95(3)(a) (Iran "must immediately terminate the unlawful detention"); *cf. Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Merits, Judgment, I.C.J. Reports 2002*, paras. 88-89, (Separate Opinion of Judges Higgins, Kooijmans, and Buergenthal) ("It would seem that the Court regards its order for the cancellation of the warrant as a form of *restitutio in integrum*", not cessation).

[458] *See* Mexico Memorial, para. 400 (citing *Rainbow Warrior (Fr.-N.Z.)*, 20 R.I.A.A., Vol. XX, 217, 270 (1990)).

[459] This generally accepted definition focuses on the continuation of the particular wrongful act itself over time. *See, e.g.*, Commentaries, *supra* note 391 at art. 14, p. 140, para. 5, Annex 23, Exhibit 153 (noting that "[i]n essence a continuing wrongful act is one which has been commenced but has not been completed at the relevant time" and that "[i]t must be the wrongful act as such which continues"). Thus, Iran's illegal detention of the hostages was a wrongful act that continued in time until their release. It is not at all clear that a series of discrete breaches could constitute a "continuing act" of the type contemplated in the *Rainbow Warrior*. This is perhaps why Mexico instead relies on a statement from the International Law Commission Commentaries basing cessation not on the continuing nature of the act itself

"continuing character" of the claim out of what are, in the first place, only alleged but unproven and discrete breaches in this case.

8.42 In doing so, however, Mexico faces some insurmountable difficulties. First, Mexico asserts that "[a]s to Article 36(1), the pattern of noncompliance is pronounced and has extended for a lengthy period"[460]. This ignores fundamentally changed circumstances: the United States has expressed its commitment to reverse previous difficulties with non-compliance and has acted decisively to make good on its word. Mexico's only reply is a flat dismissal of these United States efforts as ineffective *a priori*[461]; critically, Mexico offers no reason why an order of cessation should be granted for a practice that the United States has already taken concrete measures to stop. Second, Mexico alleges that "[a]s 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 municipal impediments continues the internationally wrongful act"[462]. As discussed above, this contention is totally at odds with the reasoning of the Court's judgment in *LaGrand*, which did not question the general validity of these municipal laws, but held that the circumstances in which they were applied in that particular case resulted in a breach[463]. As explained above, we are now fully complying with the requirements of Article 36(2) as interpreted in the Court's judgment in *LaGrand*.

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but rather on an "implication" of future breaches. This concept, based on an "implication" that is simply unwarranted in light of United States efforts to improve compliance, does not reflect customary international law.

[460] Mexico Memorial, para. 401.

[461] *See* Mexico Memorial, para. 160.

[462] Mexico Memorial, para. 402.

[463] *See LaGrand, Judgment*, para. 125.

8.43 It should be said that Mexico's request for an order of cessation follows from a profound misconception of the nature of the obligations that States Parties undertook in Article 36 of the VCCR. Put plainly, there can be no duty to cease actions that do not constitute breaches of a treaty obligation. For example, it would be inappropriate for the Court to order the United States to "ensure that its judicial authorities cease applying" the various categories of municipal law that Mexico cites. As this Court unambiguously determined, these provisions are not inconsistent with the VCCR, and their existence in United States municipal law did not *automatically* constitute a breach of Article 36[464]. Particularly now that the United States has renewed its commitment to compliance with Article 36, it is difficult to see why the Court's ruling in *LaGrand* should be considered wrong. Mexico certainly never demonstrates this.

2. Mexico's Request for Broad Guarantees of Non-Repetition has No Basis in International Law

8.44 Mexico also demands guarantees of non-repetition. These guarantees would have the Court far exceed its judicial function and order the United States to guarantee that it will, among other things, not apply a broad range of municipal law doctrines. The Court recognized the impracticability of actual guarantees of non-repetition in *LaGrand*[465].

8.45 As a general matter, like Mexico's demand for an order of cessation, its demand for broad guarantees of non-repetition simply have no basis in international law. It is telling that Mexico attempts to justify its demands for guarantees of non-repetition (and for cessation) primarily by reference to Article 30(b) of the International Law Commission's Draft Articles on

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[464] *See LaGrand, Judgment*, para. 125.

[465] *LaGrand, Judgment*, para. 124 ("no State could give such a guarantee").

State Responsibility[466]. This provision, however, does not reflect customary international law[467].

8.46 Previous to this Court's judgment in *LaGrand* and the adoption by the International Law Commission of the Draft Articles, guarantees of non-repetition in international practice generally took the form of political commitments made in the course of diplomatic exchanges. As the Commission admits, much of this practice appears to have been "inherited from nineteenth century diplomacy"[468]. Commission reports have

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[466] "The State responsible for the internationally wrongful act is under an obligation: . . . (b) To offer appropriate assurances and guarantees of non-repetition, if circumstances so require". International Law Commission, *Draft articles on the Responsibility of States for internationally wrongful acts adopted by the International Law Commission at its 53rd session*, Supplement No. 10 (A/56/10), 2001, Nov., art. 30(b), Annex 23, Exhibit 65.

[467] *See, e.g., Report of the International Law Commission on the work of its fifty-third session, Second Statement of the Chairman of the Drafting Committee, Mr. Peter Tomka*, 2701st meeting, 3 Aug. 2001 *available at* http://www.un.org/law/ilc/sessions/53/english/dc_resp2.pdf, Annex 23, Exhibit 183 (The Chairman noted that "the Committee decided to retain article 30, subparagraph (b) and article 48, paragraph 2(a) on the grounds that the provisions were drafted with great flexibility and introduced a useful policy. . . . Some members of the Committee, however, held that the provision lacked substantial roots in existing State practice, and that there was no clear evidence of an emerging principle of international law in this direction.") (emphasis added); *see also* Patrick Daillier & Alain Pellet, *Droit International Public*, p. 797, para. 488 (2002), Annex 23, Exhibit 104 *(«On peut s'interroger sur le caractère de la règle posée par la C.D.I. dans l'article 30 b) de son projet : s'agit-il de codification ou de développement progressif? Dans la pratique diplomatique, de telles assurances sont souvent exigées et parfois données . . . toutefois, on pouvait se demander s'il s'agissait là d'une obligation juridique ou de simples gestes de bonne volonté.»*) ("One might wonder about the nature of the rule proposed by the ILC in Article 30(b) of its draft: is it codification or progressive development? In diplomatic practice, such assurances are often demanded and sometimes granted . . . however, one might wonder whether this is a legal obligation or simple gesture of good will".).

[468] *See* United Nations, *Official Records of the General Assembly, fifty-fifth session, Report of the International Law Commission on the work of its fifty-*

consistently noted that "international practice is not uniform" on how and when guarantees were to be offered in diplomatic relations[469]. Indeed, the majority of incidents cited by the Commission in its Report – as well as all of those in Mexico's Memorial – date from before 1945. Even more rare are cases in which the requested guarantee of non-repetition sought would require specific actions or responses by a State Party (akin to new trials as Mexico now seeks). Thus, while Mexico contends that "[r]equests for specific steps or for specific instructions are commonly granted in international law"[470], the facts are quite the opposite. What is in fact common is that "[t]he injured State usually demands either safeguards against the repetition of the wrongful act without any specification of the form they are to take or, when the wrongful act affects its nationals, assurances of better protection of persons and property"[471]. The few instances that Mexico cites involve circumstances entirely different from those in this case and do not justify Mexico's extraordinary request.

8.47 For example, Mexico cites without discussion the *Trail Smelter* arbitration of 1938 and 1941[472]. However, the ruling in that arbitration did not rely on any principle of customary international law allowing the tribunal to dictate specific steps to be taken to remedy a breach of international law. Instead, it turned on the extraordinary terms of the *compromis,* which

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second session, Supplement No. 10 (A/55/10), p. 29, para. 88, Annex 23, Exhibit 184. 28-30, paras. 82-92.

[469] *See* Commentaries, *supra* note 391 at art. 30, p. 221, para. 12, Annex 23, Exhibit 153; *Report of the International Law Commission on the work of its forty-fifth Session, Draft articles of part two of the draft on State responsibility*, document A/48/10 in 1993 Yearbook of the International Commission, Vol. II, document A/CN.4/SER.A/1993/Add.1 (Part 2), p. 82, para. 3, Annex 23, Exhibit 154 (practice "not univocal").

[470] Mexico Memorial, para. 404.

[471] Commentaries, *supra* note 391 at art. 30, p. 221, para. 12.

[472] *See* Mexico Memorial, para. 404 n.497 (citing *Trail Smelter* (U.S./Canada), 3 R.I.A.A. 1905).

expressly permitted such a ruling[473]. As Dr. Gray has observed, the *Trail Smelter* case is in fact "exceptional in its order of an injunction" and "[t]here is apparently no instance of the award of a negative injunction by an international arbitral tribunal where no such provision was included in the *compromis*"[474].

8.48 Mexico further cites, again without discussion, the *fin de siècle* cases of the German ships "Herzog" and "Bundesrath," of 1899 and 1900, respectively[475]. These incidents, during the Boer War, simply record demands by Germany made in diplomatic practice; the United Kingdom was at complete liberty to accede to such demands or not. The same may be said of the even-older case Mexico cites, involving a letter from the United States Secretary of State to the Spanish Minister requesting "a distinct assurance" against the repetition of unlawful visitation and search of United States merchant vessels[476]. These examples of pure diplomacy do not suggest that there was a legal obligation to provide such assurances, nor do they speak to the powers of this or any other court to order States to take specific acts without their consent.

8.49 Finally, Mexico invokes three examples – once again drawn from the diplomatic context – in which the United States provided specific assurances of non-repetition in the form of

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[473] *See* Damages from Operation of Smelter at Trail British Columbia, 15 Apr. 1935, United States of America-United Kingdom, Treaty Series 893, Bevans, Vol. 6, art. 3, pp. 61-62, Annex 23, Exhibit 185 (granting the tribunal the power to "finally decide" "whether the Trail Smelter should be required to refrain from causing damage in the State of Washington in the future and, if so, to what extent" and "what measures or regime, if any, should be adopted or maintained by the Trail Smelter"); *see also* Amerasinghe, *supra* note 97 at p. 410, Annex 23, Exhibit 64.

[474] Christine D. Gray, *Judicial Remedies in International Law*, p. 12 (1987), Annex 23, Exhibit 186.

[475] *See* Mexico Memorial, para. 404 n.497 (*citing* Martens, *Nouveau Recueil*, 2d series, Vol. 29, pp. 456, 486).

[476] *See* Mexico Memorial, para. 403 n.493.

requests to the Congress to amend aspects of United States municipal law[477]. Again, these hoary examples (one of which predates the United States Civil War) merely illustrate the ability of a State to offer a certain type of specific guarantee of its own accord in the exercise of its own sovereignty. They say nothing about a legal obligation to offer a guarantee or of the power of the Court to require a State to do so.

8.50 Mexico attempts to use these diplomatic curiosity pieces from the two preceding centuries to suggest a legal basis for its own request that does not, in fact, exist. Far from supporting Mexico's far-reaching and invasive demands (including its demands that the Court order the United States to modify the application of its criminal law in its municipal courts), these old cases prove just the opposite. In fact, demands of the sort Mexico now presses are not supported by recent practice, as the Commission has recently confirmed[478]. Indeed, the Special Rapporteur expressed fundamental skepticism as to whether guarantees of non-repetition could presently be formulated as a legal obligation at all[479]. Moreover, since guarantees of non-

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[477] *See* Mexico Memorial, para. 404 n.497 (citing F.V. García-Amador, 2 *The Changing Law of International Claims* 587-88 (1984)).

[478] *See Report of the International Law Commission on the work of its forty-fifth Session, Draft articles of part two of the draft on State responsibility*, document A/48/10 in 1993 Yearbook of the International Commission, Vol. II, document A/CN.4/SER.A/1993/Add.1 (Part 2), p. 83, para. 4, Annex 23, Exhibit 154.

[479] *See* International Law Commission, *Third Report on State Responsibility by Mr. James Crawford, Special Rapporteur*, document A/CN.4/507, 15 Mar. 2001, para. 58 ("This element of flexibility is reflected in article 46 by the qualifying phrase 'where appropriate'. But this raises a second question, viz., whether article 46 can properly be formulated as an obligation at all. It may be asked what the consequences of a breach of that obligation could be. For example, could a State which had tendered full reparation for a breach be liable to countermeasures because of its failure to give assurances and guarantees against repetition satisfactory to the injured State? It does not seem very likely. If, despite earlier assurances, there is a repetition of the breach, this may be treated as a circumstance of aggravation, but that could

repetition historically were not a remedy granted in judicial proceedings (outside of the very recent practice of certain human rights bodies with special competences[480]) the availability of guarantee in judicial proceedings is by no means clear[481].

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be true in any event. There may thus be a case for expressing article 46 in more flexible terms."), Annex 23, Exhibit 187.

[480] In *LaGrand*, Germany cited a friendly settlement in the European Court of Human Rights, Application No. 34382/97 (Denmark v. Turkey) (2000), in which Turkey agreed to take certain measures. Oral Argument, *LaGrand, (Germany v. United States of America)*, CR2000/27 (Simma), part VIII, para. 23. In any event, this was a voluntary friendly settlement, not a judicial order. It also cited two judgments of the Inter-American Court of Human Rights (ICHR), *Loayza Tamayo* (1998) and *Castillo Petruzzi* (1999), holding that the states in question must take measures to comply with their obligations under the American Convention on Human Rights. However, the ICHR possesses special competence to require such measures by virtue of the American Convention, competence not granted this Court by its statute or the VCCR. Finally, in its Memorial, Mexico observes that "[t]he 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". Mexico Memorial, para. 403, n.493. Mexico omits that this is not a judicial procedure. *See, e.g.*, Shabtai Rosenne, "The Perplexities of Modern International Law: General Course on Public International Law" in *Recueil Des Cours*, Vol. 291, pp. 249, Annex 23, Exhibit 117 ("Although the [Committees that supervise various human rights conventions under the auspices of the United Nations, including the Human Rights Committee,] may adopt some of the outward signs of judicial procedures, such as separate and dissenting opinions, or self-recusation of a judge for cause, the procedure cannot be regarded as judicial".).

[481] Article 30(b) should be viewed primarily as an exercise in progressive development rather than codification. The marginal status of guarantees of non-repetition in international law is further evidenced by the fact that scholarly discussions of remedies in international law, including recent writings, tend to give this remedy scant mention, if any. *See, e.g.*, Alonso Gómez-Robledo Verduzco, "Aspectos de la reparación en derecho internacional", in *Temas selectos de derecho internacional*, pp. 181, 188-195 (1999), Annex 23, Exhibit 188 (no mention of guarantees in a discussion of four other types of satisfaction); Christine D. Gray, *Judicial Remedies in*

8.51 Even under the terms of Article 30(b) of the Draft Articles, however, Mexico's demands are clearly inappropriate. Reflecting the fact that this provision represents a policy-motivated formulation rather than a codification of existing law, Article 30(b) makes it clear that assurances and guarantees of non-repetition are available in exceptional circumstances only. First, the obligation is to offer "appropriate" assurances and guarantees, and the Commentaries recognize that these measures "will not always be appropriate, even if demanded"[482]. They certainly are "not required in all cases"[483]. Second, assurances and guarantees are appropriate only "if the circumstances so require"[484]. An exceptional remedy should be applied cautiously, not in a manner that departs precipitously from the Court's prior jurisprudence, introducing a far-reaching and unprecedented obligation. If the remedy is appropriate at all, the measures taken should be "formulated in flexible terms"[485].

8.52 Mexico's proposed order, which would dictate to the United States that certain doctrines of United States municipal

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International Law, p. 42 (1987), Annex 23, Exhibit 186 (one mention of "assurances as to the future" as part of a list of "the most common types of satisfaction" in international arbitral practice; no mention in the survey of I.C.J. practice).

[482] Commentaries, *supra* note 391 at art. 30, p. 222, para. 13.

[483] *Id.* at art. 30, p. 219, para. 9.

[484] *Id.* at art. 30, p. 222, para. 13 (quoting draft article 30(b)).

[485] *Id. See also, e.g.*, Franciszek Przetacznik, "La responsabilité internationale de l'État à raison des préjudices de caractère moral et politique causés à un autre État", in *Revue générale du droit international public*, Vol. 78, 1974, pp. 967, Annex 23, Exhibit 189. («*S'il s'agit de la réalisation de cette forme de satisfaction, elle est d'une manière générale, laissée à la discrétion de l'Etat responsable et ce principe est en conformité avec la souveraineté de l'Etat.* »)("As far as the carrying out of this form of satisfaction is concerned, it is in general left to the discretion of the responsible State; this principle is in conformity with the sovereignty of the State.").

law must not be applied, is no more flexible than a straightjacket. In addition, it would have the Court address itself to aspects of the municipal United States criminal justice systems that do not breach the VCCR.

8.53 The first aspect of Mexico's proposed order would have the Court order the United States "to ensure that its judicial authorities cease applying, and guarantee in the future that they will not apply . . . any procedural penalty for a Mexican national's failure to timely 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"[486]. As the Court confirmed in *LaGrand*, procedural doctrines such as the procedural default doctrine are not necessarily inconsistent with the VCCR. The Court determined in *LaGrand* that in certain cases 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 [the VCCR]"[487]. So long as the United States provides a means of review and reconsideration, the application of a procedural doctrine barring the raising of a claim in respect of some other theoretically available means of review and reconsideration is not foreclosed by the VCCR. For example, even if a Mexican national were to fail to timely raise such a claim or defense in the trial and appellate stages and even if there were a "procedural penalty" attached to such failure during an appellate or habeas review, there would be no procedural bar to the national's raising a VCCR claim or defense during the clemency process, and review and reconsideration could be provided through the clemency process.

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[486] Mexico Memorial, para. 407(2)(c)(i).
[487] *See LaGrand, Judgment*, para. 128(7).

8.54 The same is true with respect to the second aspect of Mexico's proposed order, which would ask the Court to enjoin "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"[488]. Even if a court at some stage in the proceedings in the United States is prevented by a municipal doctrine or judicial holding from providing review and reconsideration in the circumstances suggested, review and reconsideration in respect of the Mexican national in question may have been provided at an earlier stage of the proceedings. The Court's judgment in *LaGrand* cannot properly be interpreted to require that every court in the United States to which a claim might be presented must consider the matter for itself and on a *de novo* basis. Alternatively, review and reconsideration might be provided later during the clemency process[489].

8.55 Finally, the third aspect of Mexico's proposed order, which would seek to preclude the application of "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"[490], suffers from the same fatal flaws. Mexico has not proven that application of such doctrines or holdings has the effect of preventing recourse to all possible means that may be available to provide review and reconsideration. For example, as has been made clear above[491], an individualized showing of prejudice is not a prerequisite to access to a review and reconsideration remedy implemented through the clemency process. While such a showing may be a factor in decision-making during the clemency process, the

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[488] Mexico Memorial, para. 407(2)(c)(ii).
[489] *See supra* at Chapter VI.D.3.
[490] Mexico Memorial, para. 407(2)(c)(iii).
[491] *See supra* at Chapter VI.D.3.

availability of and recourse to the clemency process does not depend on an individualized showing of prejudice, and the lack of an individualized showing of prejudice is in no way a bar to the granting of clemency in any particular case.

8.56 In the end, *LaGrand* requires the availability of a means of review and reconsideration. It does not require multiple means of review and reconsideration. It does not require any particular means of review and reconsideration. And it does not require a particular result. As long as a means of review and reconsideration is available – as it is in the United States – the existence of other, subordinate municipal law doctrines that may preclude the availability of other possible means is entirely irrelevant.

8.57 Mexico asks this Court to issue an order incorporating guarantees of non-repetition on a scale unknown in international law or practice. Moreover, the specific guarantees that it seeks relate to conduct that does not breach the VCCR. The Court should reject Mexico's submission relating to cessation and guarantees of non-repetition.

8.58 It bears emphasizing the extraordinary nature of the relief that Mexico seeks in this case, and the deep incursion that it would cause into United States sovereignty. As this Court is aware, the vast majority of responsibility for criminal justice in the United States is within the jurisdiction of the fifty states, not the federal government. It is the criminal law and processes of these fifty states, then, that would ultimately have to accommodate any ruling by this Court. The relief that Mexico seeks is simply incompatible with those laws and processes as they currently exist. Mexico implicitly acknowledges as much, arguing that "[i]f need be, [the domestic laws of the United States] must be changed in order to provide a remedy that gives

full effect to the Vienna Convention"[492]. The changes to which Mexico alludes, however, would require concurrence of the legislatures and governors of the various states and/or the United States Congress – processes that are lengthy and fraught with uncertainty. This Court has been rightly cautious about ordering actions that would test the limits of a State's domestic legal capabilities, if not go beyond them. As we have explained, the relief adopted in *LaGrand* – that "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"[493] – can, unlike the extraordinary relief that Mexico seeks, be accommodated within the context of existing United States law. The United States respectfully requests that the Court adhere to that decision.

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[492] Mexico Memorial, para. 298.
[493] *LaGrand, Judgment*, para. 128(7).

CHAPTER IX

SUMMARY OF REASONING

9.1 For the reasons set forth above, this Court should reject Mexico's submissions. Significant aspects of Mexico's claims either exceed the jurisdiction of the Court, or should be found inadmissible. Mexico in any event has not presented a case in which it is entitled to the relief it has sought.

9.2 Through an aggressive and unparalleled outreach program, the United States has made a good faith effort to ensure compliance with Article 36(1)'s requirement to provide consular information "without delay" as that term is properly understood (that is, in the ordinary course of business and without procrastination or deliberate inaction) and, when the foreign national has so requested, to notify consular officers in the same fashion. Article 36(1) does not, however, create any obligation in respect of the timing or entitlement of law enforcement authorities carrying out their functions, including the taking of statements from detainees.

9.3 In addition, Mexico has failed to meet its burden of proving, with respect to each of the 54 cases, each of the elements required to establish that the United States has breached Article 36(1). Mexico has also failed to prove any breaches of Article 36(2).

9.4 The Court's judgment in *LaGrand* should provide the legal framework for the decision of this case. *LaGrand* interpreted Article 36(2), and articulated a remedy of review and reconsideration of the conviction and sentence in light of the violation. Since the decision in *LaGrand*, the United States has conformed its conduct, for all foreign nationals, to the holding in that case. The United States provides for case-by-case review and reconsideration of the conviction and sentence

in capital cases in light of any breaches of Article 36(1)(b). The United States does so within the framework of its laws, including through the clemency process, and it will continue to do so.

9.5 Finally, even were the Court to determine that the United States had breached Article 36 in a particular case, the Court should not go beyond the remedy it set forth in *LaGrand* for breaches of Article 36. The Court should reject Mexico's suggestion that it revisit its holding in *LaGrand* and order exceptional remedies, such as the *vacatur* of convictions, the remittal of sentences, the automatic exclusion of evidence, and sweeping guarantees of non-repetition. Moreover, the exceptional remedies requested by Mexico are not appropriate in light of the nature of the obligations set forth in Article 36 and have no basis in customary international law.

CHAPTER X

SUBMISSION

10.1 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.

Washington, D.C., 2 November 2003

William H. Taft, IV
Agent of the United States
of America

Annexes to the Counter-Memorial

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CERTIFICATION

I hereby certify the accuracy of the translations into English that appear in the Counter-Memorial and its Annexes. I also certify that the documents annexed are true copies and conform to the original documents.

William H. Taft, IV
Agent of the United States
of America