INTERNATIONAL COURT OF JUSTICE

CASE CONCERNING AVENA AND OTHER MEXICAN NATIONALS

(MEXICO v. UNITED STATES OF AMERICA)

MEMORIAL OF MEXICO

20 June 2003

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I.

INTRODUCTION

1. By Application dated 9 January 2003, Mexico instituted proceedings before this Court against the United States on claims concerning fifty-four Mexican nationals who have been convicted and sentenced to death in criminal proceedings that violated the provisions of Article 36 of the Vienna Convention on Consular Relations. By Order dated 5 February 2003, the Court ordered the United States to take all steps necessary to ensure that the three nationals in most imminent danger of execution were not executed before the Court rendered judgment on Mexico's claims. To date, no execution date has been set for any of the Mexican nationals who are the subject of this proceeding.

2. Thus, this case comes to the Court in a fundamentally different posture than did *LaGrand*, and for the most basic of reasons: while the nationals who were the subject of Germany's application had been executed prior to the rendering of the Court's judgment, the nationals that Mexico here seeks to protect remain alive. In *LaGrand*, the Court had occasion to provide a definitive interpretation of the substantive rights of the sending State and its nationals under Article 36, and the corresponding obligations of the receiving State under that Article. As a result, Mexico's case rests on the substantive foundation laid by the Court in *LaGrand*. But here, the Court will also have an opportunity to prescribe the full range of relief to which a State aggrieved by Article 36 violations is entitled, in a situation in which the nationals who are the subject of the proceeding remain in a position to benefit from that relief.

3. Put simply, Mexico contends that when a State acts to take human life through the application of law in a criminal proceeding, it should scrupulously conform its own conduct to the dictates of legal norms to which it has consented to be bound – including, as here, Article 36 of the Vienna Convention. And when the State fails in that obligation – as here, the United States has – it should provide fully effective relief in the form of new proceedings that conform to those dictates.

4. Like the United States, Mexico attaches great importance to the consular assistance and access rights codified in Article 36, particularly in the case of nationals charged with capital crimes. Over time, Mexico has created a comprehensive program of consular assistance to its detained nationals in the United States who face the death penalty.

Mexican consular officers act to ensure fair treatment of their nationals in U.S. criminal proceedings, provide the national with an understanding of the U.S. criminal system and his legal rights, closely monitor judicial proceedings, advocate before judges and prosecutors, regularly communicate with the detained national and his relatives, assist in the thorough investigation of facts, arrange and fund expert testimony, and, where necessary, provide funds for the retention of more qualified defense counsel.

5. The right of consular notification and assistance is a necessary and essential procedural safeguard for detained foreign nationals. As the drafters of Article 36 recognized, the foreign national facing criminal charges stands on a different footing than a national facing the same charges. And it is the criminal defendant's status as foreign national, rather than simply criminal defendant, to which the rights guaranteed by Article 36 are addressed.

6. The right of consular notification and assistance therefore constitutes a fundamental component of due process. The assisting consular officer can bring to bear professional expertise and local knowledge that can be used to protect the foreign national from the vulnerable position he or she occupies in the receiving State. Further, consular notification and assistance serve to ensure the effective enforcement of all other due process guarantees. For a detained foreign national, the right to be informed of the prospect of consular assistance is the necessary prerequisite to a knowing decision regarding whether to exercise or waive the right against self-incrimination, to the effective assistance of counsel, and to the opportunity to prepare a defense. As a result, the fundamental due process character of the right to consular access has been recognized in international instruments, tribunal decisions, state practice, and scholarly writings.

7. Given the critical role of the right of consular notification, a criminal proceeding that has been tainted by a violation of that right – as in the case of each of the fifty-four Mexican nationals before this Court – cannot yield a substantively acceptable conviction or sentence. This principle applies with special force in capital proceedings, which, given the irreversible character of the death penalty, require the most rigorous enforcement of procedural safeguards.

8. Yet in each and every one of the fifty-four separate capital cases that form the basis of this action, the United States has violated

Mexico's rights and the rights of its nationals under the Vienna Convention, which Mexico asserts in the exercise of its right of diplomatic protection. As in *LaGrand*, the United States has breached two separate provisions of Article 36.

9. *First*, as this Court authoritatively determined in the *LaGrand* case, the interlocking subsections of Article 36(1) of the Vienna Convention establish a system of consular protection predicated upon the requirement that competent authorities of a receiving state notify, without delay, a detained national of a sending State of his right to consular communication and assistance. To be effective, notification "without delay" requires that the competent authorities provide the contemplated consular notification prior to any act potentially detrimental to the rights of the foreign nationals, such as interrogation.

10. This functional definition is supported by the object and purpose of the Vienna Convention, the well-documented vulnerability of foreign nationals in custody to abuse during interrogation, and the United States's own practice with regard to the protection of U.S. nationals detained in other states.

11. In the cases of fifty-one of the Mexican nationals sentenced to death whose cases form the basis of this proceeding, the United States made no attempt to comply with Article 36(1) of the Vienna Convention, even though the competent authorities had reason to know of the detainee's Mexican nationality. In only three cases did the competent authorities make an effort to provide notice to the detained Mexican national, but in those cases, the notice was either not conveyed in full or not conveyed "without delay," as the Convention requires.

12. *Second*, the United States violated Article 36(2) by invoking municipal law bars to prevent Mexican nationals from challenging their convictions and death sentences on the basis of violations of Article 36. In *LaGrand*, this Court held that Article 36(2) requires that municipal laws and regulations be applied in a manner that allows "full effect" to be given to "the purposes for which the rights accorded under this Article are intended." A receiving state violates the Convention when its laws prevent the municipal courts of that State "from attaching any legal significance to the fact...[of] the violation."

13. The United States employs municipal law bars that do not allow the attribution of legal consequences to the failure of competent

authorities of the United States to provide the requisite Article 36 notification. United States courts have applied procedural default doctrines to hold that where a Mexican national has not raised his Vienna Convention claim during the prescribed phase of the criminal proceeding, he is barred from raising it subsequently. For example, where the national has not raised the claim during the course of trial, he may not raise it on direct appeal. Likewise if the national fails to raise a claim on direct appeal or in state post-judgment proceedings, he may not raise it in any subsequent federal *habeas corpus* proceedings. Thus, state and federal default doctrines bar review and reconsideration of Vienna Convention claims, even where the failure of the defendant to raise his Vienna Convention claims is a direct result of the United States's own failure to provide the required notification.

14. United States courts have also held that pursuant to a non-retroactivity doctrine, Mexican nationals are barred from any judicial relief for acknowledged Vienna Convention violations in federal *habeas corpus* proceedings. Finally, even where Mexican nationals' claims have not been defaulted, United States courts refuse to provide judicial remedies for the violations, on the ground that the Vienna Convention does not create individual or fundamental rights, or that, in any event, the defendant Mexican national has not shown prejudice from the United States's failure to abide by its obligations under Article 36.

15. The continued application of these municipal law doctrines violates not only the plain dictates of Article 36(2), but the equally plain mandate of *LaGrand*, in which this Court held that in cases implicating severe punishment, the United States was required to permit review and reconsideration of impaired convictions and sentences that take account of the Vienna Convention violation.

16. In an attempt to meet that mandate, the United States takes the position that state clemency processes provide the requisite review and reconsideration. To the contrary, the Vienna Convention confers rights both on the sending State and its nationals. Review and reconsideration that takes account of the Vienna Convention must therefore take account of the deprivation of a right and, it follows, provide a rights-based remedy. Clemency, by contrast, is just that: a discretionary act of executive grace, to which no applicant has a right, and the grant of which cannot be assured no matter how egregious the violation that the applicant might show. Moreover, as conducted, clemency processes are generally standardless, secretive, and immune from judicial oversight.

Clemency processes cannot serve to fulfill the United States' obligation to give full effect to the purpose for which the rights afforded under Article 36 are intended.

17. To remedy the United States' violations of Article 36(1) and (2) in the criminal proceedings in which the Mexican nationals who are subject to this proceeding have been convicted of capital crimes and sentenced to death, Mexico is entitled to full reparations. Mexico seeks no monetary compensation. Nor does it seek a blanket pardon or any other form of relief that would prevent the United States from retrying or resentencing its nationals in proceedings that comport with Article 36.

18. Mexico seeks, instead, only that relief which is essential to ensure that any of its nationals who are put in jeopardy of their lives in capital criminal proceedings in the United States receive the procedural safeguards that, by its adherence to the Vienna Convention, the United States has agreed to provide. Specifically, Mexico seeks reparations in the form of appropriate declarations, *restitutio in integrum*, an order of cessation, and guarantees of non-repetition.

19. The remedial starting point is *restitutio in integrum*. As the primary form of reparation available, *restitutio in integrum* seeks to re-establish the situation that existed prior to the commission of the internationally wrongful act. To restore the *status quo ante* in the circumstances of this case, the United States must take several separate and independent steps.

20. *First*, the United States must take all steps necessary to ensure the *vacatur* of the convictions and sentences of the fifty-four Mexican nationals, so that any subsequent criminal proceedings can be undertaken in conformity with international law. The annulment of judicial decisions is a well-recognized form of restitution, and is especially compelling where, as here, criminal proceedings have been tainted by violations of fundamental due process.

21. *Second*, the Court should require that the United States take all steps necessary to ensure the exclusion of evidence obtained in violation of Article 36. The rule excluding from use in criminal proceedings evidence obtained illegally is a general principle of law under Article 38(1)(c) of the Court's Statute and, in the circumstances here, requires that prosecuting authorities be barred from using in evidence statements

and confessions obtained prior to the time a foreign national is informed of his consular notification rights.

22. *Finally*, *restitutio* requires that courts in the United States be prohibited from applying any municipal law doctrine that prevents a court from attributing legal significance to an Article 36 violation because of a foreign national's failure timely to raise the Vienna Convention claim where the competent authorities have failed in their obligation to apprise the national of his rights, or any doctrine that prevents the Court from providing a remedy for an Article 36 violation, or any doctrine that requires a defendant to make an individualized showing of prejudice as a prerequisite to relief.

23. Since *LaGrand*, and contrary to the sanguine assertions of the United States about its education and training program, competent authorities in the United States continue regularly to violate the Article 36 notification provisions of the Vienna Convention, including in capital cases or other cases involving severe penalties. For example, Mexico has been apprised by its consulates of over one hundred cases since 27 June 2001 involving severe penalties in which the United States has failed to provide the requisite consular notification.

24. As a result, Mexico seeks orders from the Court that the United States cease its ongoing violations of Article 36 and, at the same time, provide Mexico with specific guarantees that its competent authorities will regularly comply with their obligations under that Article. The United States should be required to employ whatever legislative, executive, or judicial means are necessary to achieve that result.

25. This case is the third in which a State Party to the Vienna Convention on Consular Relations has sought relief on the basis of violations by the United States of Article 36 in criminal proceedings that led to the death penalty. Paraguay obtained an order of provisional measures barring the execution of its national pending the Court's judgment on the merits, but then withdrew the case after the United States, in violation of that order, allowed the execution to go forward. Germany, too, saw its national executed in violation of an order of provisional measures, but carried the case through to a judgment that allowed the Court to provide a definitive treatment of the substantive mandate of Article 36.

26. Mexico is the third State to file and to obtain an order of provisional measures. Thus far, the United States has complied with that order. Mexico hopes that, by prescribing the full range of relief that Mexico seeks in these proceedings, the Court will provide a definitive treatment of the remedial dimension of the Vienna Convention and thereby complete its work on that instrument. Equally, Mexico hopes that that work will increase the respect for and compliance with law that is the surest safeguard of international peace and justice.

II.

JURISDICTION

27. The Court's jurisdiction is based on Article I of the Optional Protocol to the Vienna Convention on Consular Relations, on which the Court based its jurisdiction in *LaGrand*.[1] Article I of the Optional Protocol provides that

> [d]isputes arising out of the interpretation or application of the [Vienna Convention on Consular Relations] shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a party to the present Protocol.[2]

28. Article I establishes two requirements for the Court to have jurisdiction. *First*, the Applicant must be a party to the Optional Protocol. *Second*, there must be a dispute "arising out of the interpretation or application" of the Vienna Convention on Consular Relations. According to this Court's long-standing jurisprudence, these jurisdictional requirements must be met as of the date of the filing of the Application, which is the critical date for the Court to determine its jurisdiction.[3] Both requirements are met here.

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[1] *LaGrand (Germany v. United States of America), Judgment*, I.C.J. Reports 2001, paras. 42, 128(1).

[2] Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes, 24 April 1963, 596 UNTS 487, Article I.

[3] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment of 14 February 2002*, para. 26; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Preliminary Objections, Judgment, I.C.J., Reports 1998*, pp. 23-24, para. 38; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United*

29. *First*, on 9 January 2003, when the Application was filed, Mexico and the United States of America were both parties to the Vienna Convention on Consular Relations and to the Optional Protocol. The United States has been a party to both the Vienna Convention and to its Optional Protocol since 24 November 1969. Mexico, in its turn, has been a party to the Vienna Convention since 16 June 1965, and acceded to the Optional Protocol on 15 March 2002. Neither of the two parties made any reservations to the Optional Protocol.[4]

30. *Second*, on 9 January 2003, there existed between Mexico and the United States a dispute "arising out of the interpretation or application" of the Vienna Convention. Prior to the filing of the Application, Mexico undertook considerable diplomatic and legal efforts to vindicate its rights and those of its nationals under Article 36 of the Vienna Convention and has spared no effort to persuade the United States to comply with its obligations under the Vienna Convention.[5] All of these efforts failed. It is clear that Mexico and the United States hold irreconcilable views about the mandate of the Vienna Convention, including fundamental disagreements about the remedy to which the sending State and its nationals are entitled in the event of a breach of the Convention in a proceeding that leads to the death penalty.

31. Mexico has consistently argued that the United States must restore the *status quo ante*, that is, re-establish the situation that existed at the time of the detention and before the convictions and sentences of Mexico's nationals as a result of proceedings that violated the United States' obligations under the Vienna Convention. To date, the United States has made no effort to provide any remedy other than repeated apologies, which this Court determined clearly in *LaGrand* are

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States of America), Preliminary Objections, Judgment, I.C.J. Reports 1998, p. 129, para. 37.

[4] List of Participants, Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes, *available at http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIII/treaty33.asp* (last visited 16 June 2003).

[5] *See infra* Chapter III.D.

inadequate,[6] and discretionary reviews by executive officials, which Mexico maintains are equally inadequate.[7]

32. As this Court held in *LaGrand*, "a dispute regarding the appropriate remedies for the violation of the Convention . . . is a dispute that arises out of the interpretation or application of the Convention and thus is within the Court's jurisdiction.[8]

33. The Court thus has jurisdiction to entertain Mexico's claims.

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[6] *LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001*, para. 123.

[7] *See infra* Chapter IV.B.4.

[8] *LaGrand (Germany v. United States of America), Merits, Judgment, I.C.J.* Reports *2001*, para. 48; *see also Vienna Convention on Consular Relations (Paraguay* v. *United States of America), Provisional Measures, Order of 9 April 1998*, para. 31.

III.

STATEMENT OF FACTS

A. THE PURPOSE OF CONSULAR ASSISTANCE IN CAPITAL CASES

34. For many decades, Mexican consular officers have been dedicated to the protection of Mexican nationals incarcerated abroad. To that end, Mexico has established an extensive and sophisticated program of consular assistance for its citizens incarcerated in the United States.[9]

35. Ever since capital punishment was re-introduced in the United States in 1976, Mexico has closely monitored the cases of Mexican nationals facing the death penalty. Mexico's commitment to the defense of its nationals has been consistent and unwavering for more than twenty-five years. As the numbers of Mexican nationals on death row have increased, however, Mexico has devoted more resources to their defense, and has become increasingly concerned over repeated violations of Article 36 in their capital murder prosecutions.

36. Thus, in September 2000, Mexico formed the ground-breaking Mexican Capital Legal Assistance Program, which to date constitutes the sole capital legal assistance program established by a foreign government in the United States. The Program is staffed by a network of ten lawyers, all of whom are experienced capital litigators.[10] These lawyers, in turn, provide expert advice to consular officers and defense lawyers representing Mexican nationals. The Program has made a qualitative difference in the legal representation provided to Mexican nationals, and has enhanced the services already provided by Mexico's forty-five consulates in the United States. The Program also seeks to increase awareness of and compliance with international law.[11]

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[9] Mexico's history of consular assistance in the United States dates back to the turn of the century. *See* Declaration of Roberto Rodríguez Hernández, paras. 12-23 (detailing historical assistance), Annex 7.

[10] *See id.*

[11] *See* Declaration of Roberto Rodríguez Hernández, para. 30, Annex 7.

37. Among other services, Mexican consular officers ensure that detained nationals understand the U.S. criminal justice system and their legal rights; closely monitor judicial proceedings; advocate before judges and prosecutors; regularly communicate with detained nationals and their relatives; provide interpreters and translation services; provide funds and logistical support to assist defense counsel in obtaining documentary evidence and conducting investigations in Mexico; retain bilingual experts and investigators; assist in the thorough investigation of facts; arrange expert testimony where helpful; and, where necessary, obtain more qualified defense counsel for their nationals.[12]

38. Through the combined efforts of consular officers and the Program lawyers, Mexico has played a decisive role in preventing the imposition of the death penalty in at least forty-five cases in less than three years.[13] In that same time, Mexico has filed sixteen *amicus curiae* briefs in U.S. courts, has provided funds for investigators and experts in at least twenty-two cases, and has offered important legal assistance to defense counsel in sixty-seven other cases.[14]

39. Consular assistance to nationals detained on criminal charges can be broken down into four essential services. First, by their very presence in the courtroom or at the police station, consular officers ensure that local authorities treat their nationals fairly.[15] Second, consular officers speak to their nationals in a language they understand, and ensure the provision of adequate interpreters. Third, consular officers explain the detainee's legal rights and facilitate communications with defense attorneys and other actors in the criminal justice system, acting, in effect, as a "cultural bridge" for the detained foreign national. Fourth, consular officers enhance the quality of the detainee's legal

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[12] *See id.*, paras. 4-17.

[13] *See id.*, para. 31. In thirty-eight of those cases, prosecutors agreed to waive the death penalty prior to trial. In four cases, defendants were sentenced to life imprisonment after jury trials. And in three cases, the defendants' sentences were commuted to life in prison.

[14] *See id.*, para. 32.

[15] *See* L. Lee, *Consular Law and Practice* (2d ed. 1991), p.124.

representation by providing competent counsel, gathering documentary or other evidence from the home state, and apprising courts and counsel of international legal arguments.[16]

1. Mexican Consular Officers Ensure the General Fairness of Proceedings

40. Mexican consular officers, at the very minimum, ensure by their very presence that a foreign national is treated with fairness in the detaining state's judicial system.[17] Innumerable studies have shown that race and ethnicity play a significant role in the administration of the death penalty in the United States.[18] Mexico has documented numerous

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[16] *See* Lee, *supra*, at pp. 133-35, 166; United States State Department, Pub. No. 10518, *Consular Notification and Access: Instructions for Federal, State and Local Law Enforcement and Other Officials Regarding Foreign Nationals in the United States and the Rights of Consular officers to Assist Them* (released Jan. 1998) at 42; J. Sims & L. E. Carter, *Emerging Importance of the Vienna Convention on Consular Relations as a Defense Tool*, The Champion, Sept./Oct. 1998 at p. 30 ("Consular officers have a strong interest in the well-being of their nationals who are visiting or living in a foreign country...All governments want to monitor the criminal prosecutions of their nationals to ensure fair treatment."); S. A. Shank & J. Quigley, *Foreigners on Texas's Death Row and the Right of Access to a Consul*, 26 St. Mary's Law J. at pp. 719, 720-21 (1995) ("[T]he mere involvement of a consul may encourage local government to follow procedural norms and minimize discrimination against a foreigner.").

[17] *See* Declaration of Roberto Rodríguez, para. 9, Annex 7; C. Cooper, *Foes of Death Penalty Have a Friend Mexico*, Sacramento Bee, 26 June 1994, at A1 (noting Mexico's intervention in Kentucky and California capital cases where death penalty avoided); A. Mendieta, *Mexico Will Aid Nationals in US; Fund will Help 45 Death Row Inmates*, Chicago Sun-Times, 6 October 2000, at 18 (describing creation of legal assistance program to defend the rights of Mexican nationals sentenced to death in the United States and bolster recognition of rights under the Vienna Convention).

[18] *See, e.g.*, Department of Justice, *Survey of the Federal Death Penalty System* (1998-2000) (concluding that federal prosecutors seek the death penalty more often for Hispanics and other minorities than whites; and noting that in Pennsylvania, prosecutors are three times as likely to seek the death penalty against Hispanics); *Final Report of the Pennsylvania Supreme Court Committee on Racial and Gender Bias In the Justice System*, Chapter 6: Racial and Ethnic Disparities In the Imposition Of the Death Penalty (2003); R. Paternoster et al,

cases in which Mexican nationals have been subjected to discriminatory treatment. At times, authorities are overtly hostile to Mexican nationals, many of whom are poor laborers who have immigrated illegally to the United States in search of work. In some communities, Mexican nationals are described as "wetbacks," "illegal aliens," and other disparaging terms. As one commentary has observed,

> Mexican immigrants come to the United States to face grossly incorrect perceptions, negative stereotypes, both malignant and benign prejudices, hostility, and antipathy.[19]

41. These attitudes, not surprisingly, can affect the authorities' decisions to seek the death penalty against a Mexican national, as well as the jury's willingness to impose it.[20]

An Empirical Analysis of Maryland's Death Sentencing System with Respect to the Influence of Race and Legal Jurisdiction (2003); U.S. General Accounting Office, *Report to Senate and House Committees on the Judiciary: Death Penalty Sentencing* 5 (Feb. 1990); Baldus, Woodworth, Zuckerman, Weiner, & Broffitt, Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, With Recent Findings from Philadelphia, 83 *Cornell Law Review* (1998) at p. 1661; D. Baldus, et al., Reflections on the "Inevitability" of Racial Discrimination in Capital Sentencing and the "Impossibility" of Its Prevention, Detection, and Correction, 51 *Washington & Lee Law Review* (1994) at p. 365; S. Gross & R. Mauro, *Death & Discrimination: Racial Disparities in Capital Sentencing* 151 (1989); D. Baldus & G. Woodworth, *Race Discrimination in America's Capital Punishment System Since Furman v. Georgia (1972): The Evidence of Race Disparities and the Record of Our Courts and Legislatures in Addressing This Issue* (1997) (report prepared for the American Bar Association); T. Keil & G. Vito, Race and the Death Penalty in Kentucky Murder Trials: 1976-1991, 20 *American Journal of Criminal Justice* (1995) at p. 17; J. Jackson, *Legal Lynching: Racism, Injustice and the Death Penalty* (1996).

[19] J. Palerm, B.R. Vincent, and K. Vincent, "Mexican Immigrants in Courts," in Joanne Moore, ed., *Immigrants in Courts* (1999) at p. 96.

[20] *See* J. G. Connell, III and Rene L. Valladares, *Cultural Issues in Criminal Defense* (2003) at xxiii-iv [hereinafter Connell and Valladares](describing jury deliberations in which many jurors made ethnically biased comments regarding the defendant, such as "If a Mexican has a gun, he must be guilty.")

42. Mexican consular officers are keenly aware of the overt and subtle ways in which Mexican nationals can be treated differently, based upon their nationality. Through their vigilant presence in courtrooms, jails, and lawyers' offices, they can detect the presence of unfair bias, and take steps to expose it. In a capital murder prosecution, Mexican consular officers would raise such concerns with the appropriate authorities, and if need be, with the court.[21]

43. But where consular officers are absent, the defense lawyer is ineffective, and the Mexican defendant is isolated, there is often no effective way to prevent discrimination from tainting the fairness of the proceedings. Unfortunately, there are many examples of this phenomenon. The case of Mexican national Jose Trinidad Loza, convicted and sentenced to death in the state of Ohio, is illustrative.[22] The lead police detective in Mr. Loza's case has admitted that he referred to Mr. Loza as a "wetback" – an exceedingly derogatory ethnic slur used to describe recent Mexican immigrants – throughout his investigation. This same officer made the decision to seek the death penalty against Mr. Loza. Indeed, the prosecution of Mr. Loza was infused with racial animus and police misconduct. In addition to the lead detective, other law enforcement officers involved in the investigation admitted that they used the term "wetback" with some regularity. Some officers agreed the term was inappropriate and could compromise an investigation, but others saw nothing wrong with it or were uncertain about the propriety of using such a term.[23]

44. Mr. Loza was never informed of his rights to consular notification and assistance by the competent authorities. Had Mexican consular officers been notified of Mr. Loza's detention, they would have

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[21] *See* Declaration of Roberto Rodríguez Hernández, para. 9, Annex 7.

[22] Case No. 52 in Mexico's Application. *See* Declaration of Roberto Rodríguez Hernández, Appendix A, paras. 334-350 (detailing case) , Annex 7.

[23] *See* Declaration of Roberto Rodríguez Hernández, Appendix A, para. 336 (*citing* Gingerich Deposition at 13, 27 (okay if said "jokingly among the guys"), at 14 (term is neither racially insensitive or derogatory), Sulfstead Deposition at 24 (did not know if use of term was racially insensitive or derogatory)), Annex 7.

been sensitive to the ethnic bias that pervaded the Middleton, Ohio police department, and would have educated trial counsel regarding the derogatory use of the term "wetback." Consular officers would also have brought the matter to the attention of the prosecutor and/or the trial court in an effort to ensure fair treatment for Mr. Loza.

45. In certain cases, Mexico has observed that Mexican nationals are singled out for the death penalty, when other, equally culpable defendants receive lesser sentences. For example, Juan Caballero Hernández, who was sentenced to death in the state of Illinois,[24] was the only Mexican national among four co-defendants, was 18 at the time of the crime, and had no record of violence. He received a death sentence, but a co-defendant who had an appalling criminal history, and was accused of instigating and committing two of the murders, received a life sentence.

46. In other cases, prosecutors have encouraged jurors to sentence a Mexican national to death, based in part on the defendant's immigration status. In the case of Hector García Torres,[25] for example, the prosecution emphasized Mr. García Torres's status as an undocumented alien as one of the justifications for the imposition of a death sentence.[26] Defense counsel failed to object to the prosecution's irrelevant and inflammatory references to Mr. Garcia Torres's immigration status, and Mr. García Torres was sentenced to death.[27]

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[24] Case No. 45 in Mexico's Application.

[25] Case No. 31 in Mexico's Application.

[26] *See* Declaration of Roberto Rodríguez Hernández, Appendix A, para. 186, Annex 7.

[27] Prosecutors used similar tactics in the case of Ricardo Aldape Guerra, a Mexican national (not included in Mexico's Application) who was wrongly convicted of capital murder and spent 15 years on death row before he was exonerated. There, prosecutors encouraged jurors to find Mr. Aldape Guerra posed a danger to society, because he had entered the United States without proper documentation. Following Mr. Aldape Guerra's sentencing proceeding, the Ku Klux Klan demonstrated outside the courtroom, carrying signs saying "Houston will not tolerate illegal alien crimes." The evidence of discrimination in Mr. Aldape Guerra's trial was raised on appeal in *amicus curiae* briefs filed

47. Naturally, the examples cited above are not exhaustive. And foreign nationals in general, as well as Mexican nationals in particular, are vulnerable to disparate treatment.

48. When they have learned of a national's incarceration well before trial, Mexican consular officers have been able to bring evidence of disparate treatment to the attention of the court, with positive results. One example is the case of Mexican national Felipe Petrona Cabañas,[28] who was charged with the murder of a police officer in Arizona. Although he was only seventeen at the time of the offense, prosecutors sought the death penalty. At the time of his arrest, numerous media reports highlighted his unlawful immigration status. Moreover, Mexico discovered that Arizona had only executed two juvenile offenders in 120 years, and both were of Mexican heritage.[29] Armed with these disturbing facts, Mexico submitted an *amicus curiae* brief to the trial court, arguing that Mr. Petrona Cabañas should not be sentenced to death. The court subsequently sentenced him to life imprisonment.

2. Mexican Consular Officers Serve as a "Cultural Bridge" For Their Detained Nationals.

49. The United States State Department has described the right of access to a consular officer as an invaluable "cultural bridge," which "[n]o one needs...more than the individual...who has been arrested in a

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by Mexico, as well as several non-governmental organizations. A federal district court eventually granted relief and vacated Mr. Aldape Guerra's conviction, concluding that the police and prosecutors in the case had intimidated Mexican witnesses and engaged in other forms of misconduct that tainted the fairness of the proceedings. *See Guerra v. Collins*, 916 F.Supp. 620 (S.D. Tex. 1995).

[28] Mr. Petrona Cabañas is not included in Mexico's Application.

[29] One of the juvenile offenders currently sentenced to death in Arizona is also Mexican – Martin Raul Fong Soto, who is Case No. 48 in Mexico's Application. In addition, as of this writing, the state of Arizona is seeking the death penalty against yet another Mexican national who was only 16 years old at the time of the offense.

foreign country."[30] Arrested foreign nationals in the United States are often isolated from family and friends, speak English as a second language or not at all, and fail to understand their rights under the U.S. criminal justice system.[31] They may also suffer from unwarranted fears about the consequences of asserting their legal rights, such as the fear of deportation.[32]

50. In order to make informed and critical decisions about his case, a foreign national must understand the basic elements of the criminal law of the detaining state.[33] As the Government of Canada has observed:

> [The typical detained foreign national,] who is not relatively sophisticated, or who lacks strong connections in the arresting community, is especially vulnerable to making dangerously uninformed choices in exercising even the rights of which the arresting authorities do inform him. He is therefore almost certain to be unable to avail himself of rights of which the arresting authorities fail to inform him. Finally, with no one to explain his predicament in the context of the more familiar system of his home country, a detained foreign national is at a considerable disadvantage in establishing a defense.[34]

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[30] *See* U.S. Dep't of State, 7 *Foreign Affairs Manual* 400, 401 *at* <http://foia.state.gov/FAMDir/masterdocs/07fam/07m0410.pdf>.

[31] *See* J. Palerm, et al., *supra*, at p. 73 ("In addition to problems of language, Mexican immigrants are likely to know nothing about the proceedings: who is in charge, what the roles of the various persons are, and what is happening.")

[32] *See, e.g., id.* at 95 (Mexican immigrants may abandon legal rights because they fear exposure of their own or family members' illegal status); *United States v. Beraun-Panez*, 812 F.2d 578, 580-81 (9th Cir. 1987) (police officers took advantage of the defendant's insecurities about his alien status by mentioning the possibility that he would be deported and separated from his family).

[33] *See* Lee, *supra*, at 166.

[34] *See Brief Amicus Curiae of the Government of Canada in Support of an Application for the Writ of Habeas Corpus in the Case of Ex Parte Joseph Stanley Faulder*, at 10, Annex 30.

51. Unlike other local participants in a state's criminal system, consular officers located in the detaining state are uniquely situated to translate the often complex and unfamiliar legal concepts into terms the foreign national can readily understand.

52. As the Foreign Affairs Manuel of the U.S. Department of State acknowledges:

> Legal systems vary greatly. . . . U.S. citizens arrested abroad often have an imperfect understanding of American criminal procedure and may have absolutely no understanding of the legal procedures of the country in which they are detained. Thus, it is essential that each mission (or where variations in local conditions warrant, each constituent post) prepare informational material for delivery to each arrested U.S. citizen regarding the judicial process the arrestee is likely to face. Posts should prepare a packet of information covering initial arrest, remand procedure, trial procedure, appeal process, and penal conditions and rules.
>
> The purpose of this material is not to usurp the function of legal counsel or encourage a "do it yourself" approach. Rather, it serves the purpose of helping arrestees understand what is happening to them and provides a yardstick against which they can measure an attorney's performance.[35]

53. Mexican consular officers are specifically trained in United States law to provide information that could prevent a detained national from waiving important legal rights and from making poor decisions with adverse legal consequences.[36] By taking the time to explain

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[35] *See* U.S. Dep't of State, 7 *Foreign Affairs Manual* 407 *at* <http://foia.state.gov/FAMDir/masterdocs/07fam/07m0410.pdf>; see, *e.g.*, Judge P. J. DeMuniz, "Introduction," in Joanne Moore, ed., *Immigrants in Courts* (1999) at p. 3 (describing case of wrongly convicted Mexican national who was Mixtec Indian, and who didn't speak Spanish or English proficiently, yet was only provided a Spanish interpreter at trial); Declaration of Dueñas Gonzalez, paras. 35-36, Annex 4.

[36] *See* Declaration of Roberto Rodríguez Hernández, para. 5, Annex 7.

thoroughly the applicable procedural rules, the roles of various actors in the criminal prosecutions, and the rights guaranteed the national at each phase of the proceedings, consular officers can overcome the national's culturally-rooted misconceptions of the criminal justice system.

54. Such services are vital for recent Mexican immigrants, as well as those who have lived in the United States for several years. Mexican nationals often remain deeply immersed in Mexican culture after their immigration to the United States.[37] Some never learn English, even after living in the United States for decades. Moreover, Mexican nationals facing the death penalty suffer the multiple impediments of foreign culture, poverty, and extremely limited education. The average Mexican national on death row has completed less than seven years of school. Seven of the Mexican nationals on death row have gone to school for less than three years.[38] Many others suffer from cognitive impairments stemming from mental retardation, brain damage, and mental illness.[39]

55. The consular officer's role as a "cultural bridge" is particularly important in relation to four aspects of a capital murder prosecution: interrogation, plea bargaining, the role of the defense attorney, and the establishment of a defense.

a. Vulnerability to Interrogation

56. Consular assistance is invaluable in order to compensate for the well-documented susceptibility of a detained foreign national to a misunderstanding of his rights during interrogation.[40] Language barriers,

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[37] *See* Declaration of Dueñas Gonzalez, paras. 9-10, Annex 4.

[38] Hector García Torres, Ramiro Ibarra Rubí, Virgilio Maldonado, Abelino Manríquez Jaquez, Juan Ramón Sanchez Ramírez, Ramiro Hernández Llanas, and Rafael Camargo Ojeda.

[39] *See* Declaration of Ambassador Roberto Rodríguez Hernández, para. 6, Annex 7.

[40] *See, e.g.*, Amnesty International, *Saudi Arabia - Alone, afraid and abused*, AI Index: MDE 23/08/00, *available at* <http://www.amnesty.org/ailib/intcam/ saudi/issues/migrant.html> (last visited April 15, 2003) ("[Arrested foreign nationals in Saudi Arabia] may be deceived or coerced into signing a confession in Arabic, a language they may not

as well as the detained foreign national's unfamiliarity with the legal process, leave him particularly vulnerable to deception or coercion by standard police interrogation techniques into waiving his rights and confessing falsely.[41] Moreover, because an indigent Mexican national will not receive an attorney to advise him during interrogation, unless he specifically requests one,[42] consular officers are in a unique position to

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understand."); Amnesty International, *Japan: Ill-Treatment of Foreigners in Detention*, AI Index: ASA 22/09/97, page 1, November 1997, *available at* <http://web.amnesty.org/library/index/engasa220091997> (last visited June 10, 2003) ("[Arrested foreign nationals in Japan] have been beaten, denied access to interpreters and lawyers [and] forced to sign statements in languages they did not understand..."); Human Rights Watch, *Presumption of Guilt: Human Rights Abuses of Post-September 11 Detainees*, Vol. 14 No. 4(G) August 2002, pp. 33-46, available at <http://www.hrw.org/reports/2002/us911/USA0802.pdf> (last visited June 10, 2003) (noting that some foreign nationals detained in the United States were informed of their rights only *after* lengthy interrogation, while others waived those rights by signing documents that they did not understand); *United States v. Short*, 720 F.2d 464, 469 (6th Cir. 1986) (noting that German defendant, whose English was limited, "apparently had no knowledge of the American criminal justice system" and had not knowingly and voluntarily waived her legal rights at the time of interrogation).

[41] This is precisely what happened in the case of Mexican national Omar Aguirre, who was wrongly convicted of murder and sentenced to fifty-five years in prison. In 1997, Mr. Aguirre was charged with the torture and murder of a Chicago store owner. He was interrogated and beaten over the course of three days. He spoke little English and believed the confession he eventually signed, which was in English, was a release for him to go home. In December 2002, federal prosecutors released Mr. Aguirre, who was entirely innocent of any wrongdoing. *See* David Heinzmann and Jeff Coen, *Jailed by Lies, Freed by Truth*, Chicago Tribune, December 22, 2002.

[42] Under *Davis v. United States*, an attorney will only be provided to an indigent detainee during interrogation if he clearly requests one. *See* 512 U.S. 452, 459 (1994). As some commentators have noted, "this rule disadvantages those who are unfamiliar with the American legal system or those whose first language is not English because they may not know how to communicate an unequivocal request." Connell and Valladares, *supra*, §4.5(b); *see also Davis* at 460 (Kennedy, J., *dissenting*) (recognizing that the *Davis* rule will disadvantage defendants with a "lack of linguistic skills").

advise and assist nationals facing police interrogation, before the appointment of an attorney.[43]

57. Mexican consular officers have repeatedly observed that Mexican nationals, many of whom are poor, uneducated laborers who speak little English,[44] will sign confessions written in English, without understanding what they are signing.[45] In the case of Mexican national Gabriel Solache Romero, for example, police officers in Chicago, Illinois interrogated him without notifying him of his Article 36 rights.[46] Mr. Solache did not speak English at the time of his arrest, but signed a confession written in English after undergoing forty hours of interrogation without an interpreter and during which he was physically abused. His confession was subsequently introduced as the primary piece of evidence against him at his trial.[47]

58. When Mexican consular officers are promptly notified of a suspect's detention, they can alleviate these misunderstandings, and can

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[43] Although the Sixth Amendment to the United States Constitution guarantees defendants a right to an attorney, that right typically does not attach until the national makes his first appearance in court. *See McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991) (*quoting United States v. Gouveia*, 467 U.S. 180, 188 (1984)) ("[The right to counsel attaches] at or after the initiation of adversary judicial criminal proceedings--whether by way of formal charge, preliminary hearing, indictment, information or arra ignment.") .

[44] "Compared to other immigrant groups, Mexican immigrants are distinguished by being young and having low educational levels, high labor participation, low family and per-capita income, and large household sizes. Mexican male immigrants are on average 17 years old, and Mexican females, 23 years old. . . More than 60 percent of the adult Mexican-immigrant population have no more than an elementary education." J. Palerm, et al., *supra*, at p. 73.

[45] *See* Declaration of Dueñas Gonzalez, paras. 35-36, Annex 4.

[46] Case No. 47 in Mexico's Application.

[47] Declaration of Roberto Rodríguez Hernández, Appendix A, para 299-312, Annex 7.

deter police abuse of detainees[48]—a point the United States conceded long ago.[49] Had Mexican consular officers been immediately notified of Mr. Solache's detention, they would have advised Mr. Solache of the implications of signing a confession under U.S. law. They would also have advised him—and the proper authorities—of the need for an official interpreter to translate Mr. Solache's statements during his interactions with the authorities.[50]

59. Consular officers can also advise their nationals on the critical differences between U.S. law and Mexican law regarding statements to law enforcement authorities. Under Mexican criminal law, a confession obtained from a criminal defendant is admissible against that defendant at trial only if the confession was taken before the prosecutor ("Ministerio Publico") or judge and in the presence of counsel or "person of confidence" to the defendant.[51] Unlike in the United States, statements given to the police during an interrogation conducted outside the presence of defense counsel cannot be used against the defendant at trial.[52] Further, unlike in the United States, Mexican law greatly reduces

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[48] *See* S. A. Shank & J. Quigley, *supra,* at 719, 720-21 ("A foreigner may also be particularly vulnerable to deception used by police detectives as a standard interrogation technique...If properly implemented, the right of consular access can significantly compensate for the difficulties confronting an accused foreigner."). *See also* Declaration of Michael Iaria, para. 9, Annex 6.

[49] *See* U.S. Citizens Imprisoned in Mexico: Hearings before the Subcommittee on International Political and Military Affairs of the House Committee on International Relations, 94th Cong., 2nd Sess. (1976), at 58 (Statement of Hon. Leonard F. Walentynowicz, Administrator, Bureau of Security and Consular Affairs, Department of State) ("Immediate consular access, in [the Department of State's] opinion, still remains the restraining factor preventing abusive treatment [in prison]"), and at 6 (Statement of Hon. William H. Luers, Deputy Assistant Secretary, Bureau of Inter-American Affairs, U.S. Department of State) ("immediate consular access" offers the best hope of effective deterrence of abuse during the interrogation").

[50] *See id.*

[51] *See* Declaration of Adrián Franco, para 8, Annex 3.

[52] *See id.*

the reliance on a confession in the trial and conviction of a defendant by minimizing its evidentiary value.[53]

60. Mexican nationals, particularly if they have had no prior contact with the United States' criminal justice system, are unlikely to understand this distinction – even when advised by the police of their *Miranda* rights.[54] Mexican national Arturo Juárez Suárez,[55] through his Spanish interpreter, told police during his interrogation that he "doesn't understand anything about the [U.S.] justice system."[56] Likewise, Felix Rocha Diaz, who spoke no English and had a fourth-grade education, testified at a pre-trial hearing that he did not understand that he had the right to have an attorney present during his interrogation, nor did he understand the meaning or implication of "waiving" his legal rights.[57] Both Mr. Juárez Suárez and Mr. Rocha Diaz gave incriminating statements to the authorities.[58] In Mr. Rocha Diaz's case, his statement was virtually the only evidence that connected him to the crime.[59] As is their practice in all cases, had consular officers been notified of their detention immediately upon arrest, they would have advised both men not to speak to the police without first seeking the advice of a lawyer,

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[53] *See id.*

[54] *See* Declaration of Dueñas Gonzalez at paras. 24-34, Annex 4. In *Miranda v. Arizona*, the United States Supreme Court indicated that a defendant must be informed of certain constitutional rights prior to interrogation. The Court provided, however, that a defendant "may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly, and intelligently." 384 U.S. 436, 444 (1966).

[55] Case No. 10 in Mexico's Application.

[56] *See* Declaration of Roberto Rodríguez Hernández, Appendix A, para. 54, n. 45, Annex 7.

[57] *See* Declaration of Roberto Rodríguez Hernández, Appendix A, para. 265, Annex 7.

[58] *See id.*, paras. 53, 266.

[59] *See id.*, para. 270.

informed them about the implications of a confession under U.S. law, and insisted on the provision of a neutral, qualified interpreter.

b. Plea Bargaining

61. In the United States, a "plea bargain" is an offer to a defendant by a prosecutor of a reduced sentence in exchange for the defendant's plea of guilty. The resolution of criminal cases through the plea bargaining process is very common in the United States.[60] The American Bar Association has recognized that in a capital case, one of defense counsel's primary obligations is vigorously to pursue such a negotiated settlement, since it is one of the most important means of protecting a defendant from the imposition of the death penalty.[61] As described below, Mexican consular officers can provide critical assistance in this process.

62. In many U.S. jurisdictions, the prosecution will accept a formal proffer of evidence in support of mitigation of a possible sentence before deciding whether to seek the death penalty.[62] The strength of this

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[60] S. Gross, Lost Lives: Miscarriages of Justice in Capital Cases, 6 *Law & Contemporary Problems* (Autumn 1998) at p. 142 ("eighty to nearly ninety percent of convictions result from guilty pleas."). The vast majority of criminal prosecutions in the United States are resolved without trials. As Mr. Gross observes, most criminal cases are resolved pre-trial, "by the exercise of prosecutorial discretion to dismiss, reduce charges, or recommend or agree to a particular sentence." *Id.* (citations omitted). *See also Santobello v. New York,* 404 U.S. 257, 260 (1971) (U.S. Supreme Court called the practice of plea bargaining "an essential component of the administration of justice" in the U.S.).

[61] *See generally* American Bar Association, Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Guideline 10.9.1 (revised edition, 2003) , Annex 66. As one of the most prominent capital litigators in the United States has observed, "[d]eath is different because avoiding execution is, in many capital cases, the best and only realistic result possible." K. McNally, *Death is Different: Your Approach to a Capital Case Must be Different, Too,* The Champion, Mar. 1984, at 8, 15. As a result, plea bargains must be aggressively sought by defense counsel in all capital prosecutions. *Id.*

[62] *See* ABA Guidelines, Guideline 10.9.1 (Commentary) , Annex 66.

presentation, along with other factors, can play a substantial role in persuading the prosecution to waive the death penalty.[63] In some jurisdictions, this decision may not be conditioned on the defendant's acceptance of guilt, but in many states, the prosecution will only agree to waive the death penalty if the defendant pleads guilty to murder and accepts a lengthy term of imprisonment.[64]

63. Consular officers play two critical functions in the delicate, often protracted negotiations that lead to a plea bargain. *First*, consular officers meet with prosecutors, or present written submissions, that contain crucial mitigating evidence. Often, consular officers will have gathered this evidence themselves, in Mexico, after learning of the defendant's detention. The consulate commonly searches all archives and databases in Mexico to determine whether the defendant has a prior criminal record, and provides documentation of that search to defense counsel. Other times, consular officers will obtain school and hospital records that provide proof of a defendant's mental or physical condition.[65] Sometimes, consular officers can explain cultural factors that mitigate the defendant's culpability.[66]

64. Through these efforts, Mexican consular officers have played a vital role in persuading prosecutors to waive the death penalty in at least thirty-eight cases in the last three years alone.[67]

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[63] *See id; see also* W. S. White, Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care, 1993 *University of Illinois Law Review* (1993) at pp. 328-29.

[64] *See* ABA Guidelines, Guideline 10.9.1 (Commentary) , Annex 66.

[65] *See* Declaration of Roberto Rodríguez Hernández, para. 11, Annex 7.

[66] *See* A.D. Renteln, *Raising Cultural Defenses,* in Connell and Valladares, *supra*, at 7-20 (describing case of Mexican national who killed a man in response to a deeply offensive insult, and explaining how his culture influenced his response).

[67] Declaration of Roberto Rodríguez Hernández, para. 31, Annex 7. *See also* Declaration of Michael Iaria, para. 6 (describing the case of Mexican national Nicolas Solorio Vasquez) , Annex 6; L. Lafay, *Virginia Ignores Outcry*, The

65. *Second*, consular officers assist in explaining the plea bargaining process to the defendant. It is critical that defendants understand this concept, since it may provide the only means by which they can avoid possible execution.[68] Mexican law, however, does not allow for plea bargaining for serious felonies.[69] Consequently, Mexican nationals unfamiliar with the plea bargaining process may not understand the benefits that derive from this practice. Defense counsel's efforts to explain the process are often unavailing, since Mexican nationals frequently mistrust court-appointed attorneys provided by the government that is seeking to incarcerate them.[70]

66. Mexican nationals may also fail to comprehend that *unless* there is a specific agreement to provide leniency, their plea of guilty will not guarantee a lesser punishment. For example, in at least two of the cases listed in Mexico's Application, nationals entered guilty pleas without any negotiated settlement.[71] In neither case did the defendant obtain any concession from the prosecution in exchange for his guilty plea. Both received the death penalty.

67. In several cases, Mexican consular officers have played an instrumental role in explaining the advantage of accepting a plea bargain. One example is the case of Francisco Gonzalez Reyes, who was accused of a triple homicide in the state of Florida. In early 2002, the prosecution

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Roanoke Times, 6 July 1997, at C1 (noting that Mexican consulate negotiated plea bargains on behalf of two Mexican citizens facing the death penalty).

[68] *See, e.g.*, Declaration of Michael Iaria, para. 7, Annex 6.

[69] *See* Declaration of Adrián Franco, para. 7, Annex 3.

[70] *See* J. Palerm, et al., *supra*, at p. 93 ("If there is a high risk involved in the situation, Mexican immigrants may refuse to divulge information to anyone in authority – attorney, judge, or counselor.").

[71] Daniel Angel Plata and Carlos Rene Pérez Gutiérrez (cases No. 40 and No. 51 in Mexico's Application, respectively). Mr. Pérez Gutierrez entered a so-called "Alford" plea, under which he technically admitted no guilt; the practical effect, however, is exactly the same as a guilty plea. The defendant is convicted, and deemed to be guilty of the crime. *See North Carolina v. Alford*, 400 U.S. 25 (1970) (allowing plea of guilty even where defendant maintains innocence).

offered Mr. Gonzalez Reyes the option of pleading guilty, and receiving three life sentences. The evidence of his guilt was overwhelming. Mr. Gonzalez Reyes, however, would not accept the offer.

68. None of the doctors who had evaluated Mr. Gonzalez Reyes, either for the defense or the prosecution, spoke Spanish. The court would not authorize funds for an out-of-state expert, so Mexico retained Dr. Antonio Puente, a bilingual neuropsychologist to evaluate Mr. Gonzalez Reyes' mental status. According to defense counsel, Dr. Puente "quickly built a rapport with Francisco," and as a result, Mr. Gonzalez Reyes was more forthcoming in providing information relating to his mental health. The expert concluded that Mr. Gonzalez Reyes was mentally retarded.

69. Armed with this knowledge, consular officers took extra care in explaining his legal rights. In addition, the consulate explained the situation to Mr. Gonzalez Reyes' family, who also spoke to the defendant and encouraged him to accept the offer. Finally, on 23 January 2003, Mr. Gonzalez Reyes accepted the prosecution's offer, and was sentenced to life imprisonment.[72]

c. Providing a Bridge to Defense Counsel

70. Typically, poor Mexican nationals distrust individuals in a position of authority, and lack faith in the ability of the legal system to protect them.[73] Their distrust frequently extends to their own defense

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[72] In addition, if defense attorneys do not speak Spanish, they may not spend enough time explaining key concepts to their Mexican national clients. This is particularly important when the prosecution offers to resolve the case through a plea bargain. The intervention of a Spanish-speaking consular officer or attorney, in these cases, is often critical in helping the national understand his rights. For instance, Mexican national Carlos Jahuey Carillo, who was facing the death penalty in Arizona, was offered a plea bargain by prosecutors that called for life imprisonment in lieu of the death penalty. He repeatedly rejected the offer, until Mexico retained a Spanish-speaking lawyer to explain the terms and conditions of the agreement, as well as the consequences of rejecting the agreement. On 18 December 2002, he accepted the prosecution's offer, and was sentenced to life imprisonment.

[73] *See* Declaration of Adrián Franco, para. 5, Annex 3; *see generally* J.Palerm, et al, *supra*, at p. 92. These attitudes are prevalent among other foreign nationals in the legal system, as well. *See* J. Bauer, *Speaking of Culture: Immigrants in*

lawyers, whom they view as being part of the legal system.[74] Consular intervention is critical to explain the role of defense counsel, and encourage meaningful and open communication between lawyers and their Mexican national clients.

71. It is not uncommon for Mexican nationals to develop a relationship of trust with consular officers that simply does not extend to their defense attorneys. Consular officers speak their language, understand Mexican slang, and offer the solidarity of a fellow countryman. Consular officers can also detect symptoms of cognitive impairments that often go undetected by lawyers who do not speak Spanish, and cannot hear the verbal cues of mental illness. Some attorneys attribute odd behavior to cultural differences, when in reality, it is a sign of mental illness or mental retardation.[75]

3. Mexican Consular Officers Enhance the Quality of Legal Representation At Trial

a. Monitoring Trial Counsel

72. It is certainly no exaggeration to observe that the single most important factor in determining whether a capital defendant lives or dies is the quality of his trial attorney. As the American Bar Association has explained,

> The quality of counsel's "guiding hand" in modern capital cases is crucial to ensuring a reliable determination of guilt and the imposition of an appropriate sentence. Today, it is universally accepted that the responsibilities of defense counsel are uniquely demanding, both in the highly specialized legal

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the American Legal System, in Joanne Moore, ed., Immigrants in Courts (1999), at p. 18; Connell and Valladares, *supra*, at 1-7 (describing El Salvadoran witness' tendency to defer to prosecutor's questions by answering "*no recuerdo*" (I don't remember) when she actually meant "no").

[74] *See* J. Palerm, et al., *supra*, at p. 92.

[75] *See* Declaration of Roberto Rodríguez Hernández, para. 7, Annex 7.

> knowledge that counsel must possess and in the advocacy skills he or she must master. At every stage of a capital case, counsel must be aware of specialized and frequently changing legal principles and rules.[76]

73. Yet it is by now commonplace in the United States that indigent defendants are represented by untrained, unqualified, or under-funded attorneys. As one leading expert on capital punishment has observed, it is often:

> abysmally ineffectual lawyers - chronically under-remunerated; often young and inexperienced, patently unqualified and incompetent, unethical, or bar-disciplined; sometimes drug-impaired, drunken, comatose, psychotic, or senile; very often grossly negligent; and nearly always out-gunned --who represent capital defendants in most death penalty states around the country.[77]

74. It has been persuasively shown that in important respects "this counsel situation is worse in capital than in noncapital cases" in the United States.[78] United States Supreme Court Justice Ruth Bader Ginsburg has been quoted as stating flatly: "People who are well represented at trial do not get the death penalty," and "I have yet to see a death case among the dozens coming to the Supreme Court on eve-of-execution stay applications in which the defendant was well-represented at trial."[79]

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[76] ABA Guidelines, Guideline 1.1 (Commentary) , Annex 66.

[77] J. Liebman, The Overproduction of Death, 100 *Columbia Law Review* (2000) pp. 2102-06; *see also Alabama v. Shelton*, 122 S. Ct. 1764, 1772 (2002), *quoting United States v. Cronic*, 466 U.S. 648, 656 (1984) (indigent counsel often fail to subject the government's case to "the crucible of meaningful adversarial testing").

[78] Liebman, *supra*, at pp. 2102-06.

[79] Anne Gearan, *Supreme Court Justice Supports Death Penalty Moratorium,* ASSOCIATED PRESS, 9 April 2001.

75. Mexican consular officers are specifically trained to monitor and support defense counsel's efforts, attend court proceedings, and confer regularly with the defendant and his family.[80] Some attorneys – particularly if they are not Spanish-speaking – will not take the time to visit their clients.[81] In these cases, consular officers – or the attorneys working with the Government of Mexico – are literally the only people communicating with detained Mexican nationals. Here, too, Mexico's involvement in a case can make the difference between life and death.[82]

76. Sometimes, defense attorneys are competent, but lack experience representing Mexican nationals. In these cases, consular officers will provide guidance on cultural factors, provide names of bilingual experts, and assist in investigating the national's life in Mexico.[83]

77. Other defense counsel are simply incompetent, as in the case of Mr. Carlos Avena Guillen.[84] In these cases, Mexican consular officers

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[80] *See* Declaration of Roberto Rodríguez Hernández, para. 6, Annex 7.

[81] Two of the Mexican nationals listed in this Application, Daniel Angel Plata (No. 40) and Ramiro Ibarra Rubí (No. 35), never met the lawyers who represented them during their state post-conviction appeals. Clearly, a lawyer who never meets his client is unable reliably to determine whether the client suffers from mental disabilities, regardless of cultural barriers. *See id.*, para 8.

[82] The case of Ernesto Baylon Mendoza is illustrative. Mr. Baylon Mendoza was charged with capital murder in rural Texas. Mexican consular officers enlisted the assistance of a Spanish-speaking attorney to interview Mr. Baylon Mendoza. After interviewing him, the attorney determined that Mr. Baylon Mendoza was a juvenile at the time of the crime. Mexican consular officers subsequently obtained his birth certificate for defense counsel. Defense counsel had been representing Mr. Baylon Mendoza for six months, but was not even aware that his client was only seventeen at the time of the crime. Counsel showed Mr. Baylon Mendoza's Mexican birth certificate to the prosecution, which promptly agreed to waive the death penalty. *See* Declaration of Roberto Rodríguez Hernández, para. 33, Annex 7.

[83] *Id.*, paras. 6-8.

[84] *See* discussion of Mr. Avena Guillen's case infra, Chapter III.B.3.

do not hesitate to (1) persuade the court to discharge court-appointed counsel and provide new counsel; (2) recruit *pro bono* counsel; or (3) retain counsel to represent the defendant.[85] By enhancing the quality of legal representation, consular assistance is vital to an adequate defense.[86]

78. For example, in the case of Nicolas Solorio Vasquez, a Mexican national charged with capital murder in the state of Washington,[87] the court initially appointed a patently unqualified lawyer to represent him.[88] Mexican consular officers objected to his appointment, and requested that the court appoint a more qualified attorney. In response to Mexico's objections, the lawyer withdrew from the case, and another lawyer was appointed. The new lawyer was

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[85] *Id.*, para. 9.

[86] *See, e.g.*, Report to the UN Commission on Human Rights (document E/CN.4/1998/68/Add.3), Findings of the Special Rapporteur, 117-121 ("[N]ot informing the [foreign national] defendant of the right to contact his/her consulate for assistance may curtail the right to an adequate defence[.]"). The case of Liliana Piña, a Mexican national charged with murder in rural Arkansas, is illustrative. While Ms. Piña was initially represented by an experienced capital litigator, he was subsequently removed from the case and did not get another lawyer for several weeks. She remained in the jail, isolated and depressed, and her mental condition began to deteriorate. When a consular officer observed Ms. Piña's mental decline and learned that she was without legal representation, the consular officer contacted jail officials, the district attorney's office, and expert legal counsel with the Mexican Capital Legal Assistance Program. Counsel located an experienced capital litigator in Arkansas, and then persuaded a judge to appoint him to represent Ms. Piña. Ms. Piña was immediately removed from the jail and transferred to a psychiatric facility. Mexico then provided funds for both a bilingual neuropsychologist, and referred defense counsel to a bilingual psychiatrist, both of whom evaluated Ms. Piña. The psychiatrist concluded she was incompetent to stand trial, was insane at the time of the crime, and did not understand her legal rights at the time of her interrogation. Faced with this new information, as well as a competent and aggressive defense lawyer, the prosecutor offered to waive the death penalty, and Ms. Piña pleaded guilty to a lesser charge. *See* Declaration of Roberto Rodríguez Hernández, para. 33, Annex 7.

[87] Mr. Solorio Vasquez's case is not included in Mexico's Application.

[88] *See* Declaration of Michael Iaria, para. 5, Annex 6.

ultimately successful in persuading the prosecution to waive the death penalty, even though the case was highly aggravated.[89]

b. Gathering Evidence

Mexican consular officers also assist in gathering evidence for trial. Most often this takes the form of locating records and witnesses in Mexico.[90] Where necessary, however, the consulate also provides funds for the retention of experts and criminal investigators to aid in the presentation of an effective defense on behalf of the national.[91] For instance, in the case of Ernesto Esteban Ramirez Anguiano, charged with murder in Dallas, Texas, the Mexican consulate conducted such a thorough investigation of the crime that prosecutors dismissed the charges against him. In a letter written to the Texas Attorney General's office opposing Mexico's attempt to gather police reports on the case, the district attorney observed:

> I have also learned that the Consulado General de Mexico has provided investigators for the benefit of the defendant and the attorney representing him in the murder case. They have interviewed witnesses in the criminal case and provided translators. They have made the defendant's defense attorney aware of additional witnesses that were unknown to law enforcement officers, helped the defense attorney locate additional witnesses, interviewed those witnesses and even determined who has possession of the murder weapon that deputies were unable to locate at the scene of the crime. They are clearly acting on behalf of the defendant in the criminal case.[92]

79. On 8 May 2003, the prosecution announced that it would be dismissing all charges in the case.[93] Mr. Ramirez Anguiano's defense

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[89] *Id.*

[90] *See* Declaration of Roberto Rodríguez Hernández, paras. 11-13, Annex 7.

[91] *See* Declaration of Roberto Rodríguez Hernández, para. 11, Annex 7.

[92] *See* Declaration of Peter Lopez, paras. 7-8, Annex 2.

[93] *See id.* at para. 10.

counsel has stated that without Mexico's assistance, Mr. Ramirez Anguiano would likely still be facing murder charges.[94]

c. Preserving International Legal Issues

80. Mexican consular officers also assist defense counsel by educating them directly about Article 36 obligations and helping to raise the claim of a violation as early as possible.[95] This is particularly important with regard to the municipal law doctrine of procedural default, discussed *infra* in Chapters III.C and IV.B. The doctrine mandates that where trial counsel does not raise certain substantive rights at trial, those rights are lost to the national in all subsequent proceedings.[96] In the last three years alone, Mexico has provided information on Article 36, as well as sample briefs and other information on international law, in at least sixty-seven capital cases involving Mexican nationals. In this way, Mexico has succeeded in preserving crucial legal issues that can later be raised on appeal, even if the defendant is convicted and sentenced to death.[97]

4. Mexican Consular Officers Assist in Amassing Vital Mitigation Evidence.

81. In a capital case, it is imperative that defense counsel conduct a wide-ranging and intensive investigation of the defendant's background, mental condition, and life experiences to gather evidence that militates

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[94] *See id.* at para. 11.

[95] *See* Declaration of Roberto Rodríguez Hernández, para. 10, Annex 7.

[96] *See* discussion, *infra* Chapter IV.B.

[97] In other cases, Mexico has intervened to preserve a defendant's rights to appeal his conviction and death sentence, after incompetent defense attorneys missed crucial filing deadlines. Appellate review in capital cases is governed by strict filing deadlines. If those deadlines are not met, the courts will refuse to review a defendant's appeal. This happened in the case of Daniel Angel Plata, whose attorney missed a filing deadline by *five months*. Mexico retained counsel to file an *amicus* brief in the federal district court, and was able to persuade the court to permit Mr. Plata to file his appeal. *See* Declaration of Roberto Rodríguez Hernández, Appendix A, para. 250, Annex 7.

against the imposition of the death penalty. In the parlance of capital litigation, this "mitigating evidence" is presented not as a legal defense to the crime itself, but rather as an explanation for why the crime was committed. Mitigating evidence serves to humanize the defendant, both in the eyes of the prosecution and in the eyes of the jury, and is an essential component in the defense of every capital case.[98]

82. As described above, mitigating evidence is often presented to the prosecution prior to trial in an effort to persuade the prosecution to waive the death penalty. In addition, mitigating evidence is presented during the sentencing phase of a capital murder trial.[99] At the sentencing phase, mitigating evidence – often available only in the home state – provides the best and only hope of convincing the jury to spare the national's life.[100]

83. Without the assistance of the consulate, mitigation investigation on behalf of a Mexican national is extraordinarily difficult. As one of the United States' leading capital investigators has explained:

> In my experience, the process of compiling an accurate social history is even more time-consuming and delicate when interviewing clients and family members from foreign cultures, due to inevitable cultural misunderstandings about the nature of the legal process and the purpose of the investigation. Every aspect of the

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[98] *See* ABA Guidelines, Guideline 10.7 (Commentary), Annex 66.

[99] Capital prosecutions in the United States are bifurcated. In the first stage, the jury decides whether the Government has proven, beyond a reasonable doubt, that the defendant committed the charged offense. In the second stage, the jury must decide whether to sentence the defendant to be executed. *See* ABA Guidelines, Guideline 1.1 (Commentary), Annex 66.

[100] Often this evidence is presented through a myriad of bilingual and bicultural experts, including psychologists, psychiatrists, sociologists, social workers, and others. Consular officers frequently are more familiar with these experts than local defense counsel. In several cases, where the national has not been able to secure funding for these experts from the court, Mexico has provided the necessary funding. *See* Declaration of Roberto Rodríguez Hernández, para. 11, Annex 7.

> investigation is more difficult abroad, from gathering records to gaining the trust and cooperation of witnesses.[101]

84. Investigation in rural Mexico is costly, time-consuming, and logistically complicated. With the assistance of Mexican consular officers, however, attorneys obtain records, interview witnesses, identify and secure local guides to help locate witnesses, and ensure Mexican witnesses are provided transportation and visas to enter the United States.[102] Mr. Stetler observes:

> The degree of cooperation of the foreign government can have tremendous impact on the success or failure of the investigation. The foreign government can assist in securing the cooperation of local institutions in locating and copying historical records, it can provide access to ethnoculturally competent experts who can facilitate counsel's understanding of the client's world and worldview, and it can promote trust between client and counsel by helping the client understand the legal framework in which counsel is operating.[103]

85. In the last three years alone, Mexico has provided funds for experts, mitigation specialists, or investigators in *at least* twenty-two capital murder cases. In dozens of other cases, Mexico has gathered records and documents from Mexico. Mexico is confident that these efforts have saved the lives of Mexican nationals.

86. The importance of consular assistance in gathering mitigating evidence was recently recognized by the Oklahoma court of last resort in the case of Gerardo Valdez, a Mexican national sentenced to death in

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[101] *See* Declaration of Russell Stetler, para. 15, Annex 34.

[102] *See* Declaration of Peter Lopez, para. 4, Annex 2; Declaration Michael Iaria, para. 6, Annex 6; Declaration of Roberto Rodríguez Hernández, para. 13, Annex 7; *see also* S. Bright, Counsel for the Poor: The Death Sentence Not for the Worst Crime But for the Worst Lawyer, 103 *Yale Law Journal* (1994), at p. 1877.

[103] Declaration of Russell Stetler, para. 16, Annex 34.

that state in 1989. The court observed that Mr. Valdez had been represented at trial by a lawyer who had never before handled a capital case. He had no money to retain experts or investigators, and neglected to investigate Mr. Valdez's childhood in Mexico. The Oklahoma court held:

> We cannot ignore the significance and importance of the factual evidence discovered with the assistance of the Mexican Consulate. It is evident from the record before this Court that the Government of Mexico would have intervened in the case, assisted with Petitioner's defense, and provided resources to ensure that he received a fair trial and sentencing hearing...We believe trial counsel, as well as representatives of the State who had contact with Petitioner prior to trial and *knew* he was a citizen of Mexico, failed in their duties to inform Petitioner of his right to contact his consulate.[104]

87. As in the case of Mr. Valdez, consular officers had no opportunity to assist the defense in gathering mitigating evidence in the cases of thirty Mexican nationals listed in Mexico's Application. While many of those cases have not yet been fully investigated, as discussed above it is clear that in at least some of the cases, attorneys failed to detect compelling evidence of severe cognitive impairments. For instance, at least five Mexican nationals facing the death penalty have been found to be mentally retarded in the last three years alone, after Mexico alerted defense counsel to the need for psychological testing and/or referred defense counsel to competent, bilingual experts: Virgilio Maldonado,[105] Ramiro Ibarra Rubí,[106] José Calderon Palomino,[107]

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[104] *Valdez v. State*, 46 P.3d 703, 710 (Okla. Crim. App. 2002).

[105] Case No. 36 in Mexico's Application.

[106] Case No. 34 in Mexico's Application.

[107] *See* Declaration of Denise I. Young, Annex 5. Mr. Calderon Palomino was recently found ineligible for the death penalty, due to his mental retardation. He is not listed in Mexico's Application.

Francisco Gonzalez Reyes,[108] and Daniel Angel Plata.[109] In three of those cases, Mexico provided the necessary funds for testing and/or investigation, since defense counsel had no resources to retain a mental health expert.[110]

88. In other cases, trial attorneys failed to locate key mitigation witnesses living in Mexico. During post-conviction proceedings in those same cases, however, consular officers have found witnesses and arranged for defense counsel to interview them. For instance, in the case of Omar Fuentes Martinez,[111] the consulate located Mr. Martinez's brother by arranging a radio broadcast in Nuevo Laredo, Mexico, where the witness was living. The consulate knew that the majority of Mexicans, particularly in communities with high illiteracy rates, receive news through radio stations. The witness, who did not read or write, heard the announcement and responded. No decision has yet been issued in Mr. Martinez's post-conviction challenge.

B. THE UNITED STATES 'S FAILURE TO NOTIFY MEXICAN NATIONALS OF THEIR RIGHT TO CONSULAR ASSISTANCE

1. Fifty-four Cases of Non-Compliance With Article 36.

89. Fifty-four[112] Mexican nationals have been convicted and sentenced to death as a result of criminal proceedings in which the

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[108] Mr. Gonzalez Reyes, whose case is discussed in greater detail, *supra* at paras 67-69, is not listed in Mexico's Application since he pled guilty and received a life sentence.

[109] Case No. 40 in Mexico's Application.

[110] *See* Declaration of Roberto Rodríguez Hernández, para. 7, Annex 7.

[111] Case No. 15 in Mexico's Application.

[112] This number encompasses all of the Mexican nationals listed in Mexico's Application, except one: Angel Maturino Resendiz. In his case, Mexico has concluded that the authorities did provide the requisite notification "without delay;" that is, before taking any action detrimental to the rights of the detainee. Mexico therefore seeks no remedy for Mr. Maturino Resendiz (No. 37), since there was no apparent violation of Article 36.

United States failed to comply with their obligations to inform them, without delay, of their rights to consular notification and access under Article 36(1)(b).[113] Fifty-one of these nationals currently face death sentences in the United States.[114] In each case, the competent authorities had reason to be aware of the detained individual's Mexican nationality. Nevertheless, in each case, Mexican nationals were deprived of their rights to seek consular assistance, and Mexico was deprived of its right to provide consular services. In the vast majority of cases, Mexican consular officers learned of their nationals' detentions only coincidentally – through sources such as the national's family, media reports, or the national himself.

90. In thirty cases, Mexico learned of the detentions only after its nationals were already tried, convicted, and sentenced to death.[115] At that juncture, most often a number of years after the date of arrest, the Mexican consulate's assistance was necessarily limited to humanitarian assistance and the provision of legal assistance in post-judgment proceedings. As discussed more fully below, Mexico was prevented in these cases from providing consular services at the most critical phase of the capital murder prosecution; namely, prior to and during trial proceedings.

However, since the filing of Mexico's Application, Mexico has discovered an additional Mexican national under sentence of death in California. The detainee, Enrique Zambrano Garibi, was first detained in 1989, and was sentenced to death in 1993. The authorities never notified Mr. Zambrano of his rights under Article 36, nor did they notify Mexican consular officers of his detention. The case is discussed in detail in the Declaration of Roberto Rodríguez Hernández, Appendix A, paras. 146-149, Annex 7.

[113] *See id.*, Appendix A, Annex 7.

[114] Three Mexican nationals, Juan Caballero Hernández (No. 45), Mario Flores Urbán (No. 46), and Gabriel Solache Romero (No. 47), also were convicted and sentenced to death as a result of criminal proceedings in which the U.S. failed to abide by Article 36 of the Vienna Convention. Their sentences have since been commuted by former Governor Ryan of Illinois as his final act in office on 11 January 2003. Mexico continues to seek a remedy on their behalf to redress the authorities' failure to comply with Article 36 in their cases.

[115] *See* Declaration of Roberto Rodríguez Hernández, Appendix A, Annex 7.

91. In twenty-four cases, Mexico learned of the nationals' detentions before trial, but often after the authorities had obtained incriminating statements or taken other actions harmful to the rights of those nationals. In only three of these twenty-four cases did the authorities even attempt to comply with Article 36 in a timely manner. In two cases, the authorities notified the defendant of his rights under Article 36, but failed to provide the requisite notification "without delay."[116] In another case, the authorities failed to provide complete Article 36 notification to a mentally ill national specifically, failing to inform him that they would, on his request, inform the consular post of his detention, pursuant to Article 36(1)(b).[117]

92. In each of the fifty-four cases presenting violations of Article 36, had Mexico been notified by United States authorities of the detentions of its nationals without delay, Mexico would have rendered comprehensive legal and humanitarian assistance, consistent with its long-standing policy and practice in capital cases.

93. The cases of César Roberto Fierro Reyna and Carlos Avena Guillen, two Mexican nationals whose capital murder prosecutions were tainted by such failures, typify the plight of the fifty-four Mexican nationals facing execution. Mr. Fierro Reyna remains at imminent risk of execution in the state of Texas.

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[116]Marcos Esquivel Barrera (No. 7) and Arturo Juárez Suárez (No. 10). In the case of Arturo Juárez Suárez, despite the police department's full awareness of the defendant's nationality, the police interrogated Mr. Juárez Suárez and obtained an incriminating statement. Only after obtaining the statement – which was used as evidence against him at trial – did the authorities notify him of his rights to consular notification and access. In the case of Mr. Esquivel Barrera, the authorities formally notified him of his Article 36 rights more than one year after his arrest.

[117] In the case of Pedro Hernández Alberto (No. 13), the police officer who arrested him stated that he told the defendant that "if he wanted to contact the Mexican Consulate that he could." When the defendant failed to respond, the officer began to interrogate him. The officer neglected to inform Mr. Hernández Alberto that the authorities would inform the closest consular post of his detention, and would forward any communication from Mr. Hernández Alberto without delay.

2. César Roberto Fierro Reyna[118]

94. On 1 August 1979, Texas authorities arrested Mr. Fierro, age 22, on suspicion of murder of a taxi cab driver in El Paso, Texas on 27 February 1979.

95. El Paso sits directly across the border from Ciudad Juárez, Mexico. Shortly after the murder, witnesses positively identified two suspects as having been seen driving the victim's cab across the border into Ciudad Juárez on the night of the crime. The police recommended that capital murder charges be brought against them. Prosecutors instead charged both suspects with unauthorized use of the victim's taxi.

96. Five months after the homicide, a mentally disturbed juvenile offender approached the El Paso police and claimed that he had been a passenger in the victim's cab, and witnessed Mr. Fierro commit the murder. After discovering that Mr. Fierro was a Mexican national and resident of Ciudad Juárez , the El Paso police detectives drove to Juárez to meet with Juárez police Comandante Jorge Palacios. Shortly after this meeting, the Juárez police abducted Mr. Fierro's parents and held them in the Juárez jail.

97. The El Paso police then arrested Mr. Fierro at the El Paso County jail, and began their interrogation. He was never advised of his rights to consular notification and access under Article 36. At the time, he spoke little English, and had had only attended school for five years in Mexico.

98. Mr. Fierro initially denied any knowledge of the crime. Once he learned that the Juárez police had abducted his parents, however, he gave a full "confession" to the crime. After securing Mr. Fierro's confession, prosecutors dismissed the charges against the two initial suspects and released them from custody.

99. Almost immediately after his parents were released, Mr. Fierro recanted his confession, declaring that he was innocent and had

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[118] Case No. 30 in Mexico's Application. For detailed citations of the facts discussed in the case of Mr. Fierro, see Declaration of Roberto Rodríguez Hernández, Appendix A, paras. 163-182, Annex 7.

confessed only out of fear that his parents would face brutal torture at the hands of the notorious Juárez police if he did not cooperate.

100. At a pre-trial hearing to suppress Mr. Fierro's statement as having been coerced, however, the El Paso police detective insisted that he had no prior knowledge of the arrest of Mr. Fierro's parents in Juárez, that he had not conspired with the Juárez police and that no coercion was used to elicit the confession. Mr. Fierro's confession was found admissible by the court and the case proceeded to trial.

101. No physical evidence linked Mr. Fierro to the crime. Indeed, aside from the confession, no other evidence corroborated the alleged eyewitness account. At trial, Mr. Fierro's landlord corroborated his alibi for the night of the crime. The prosecution's key witness gave contradictory and bizarre testimony, at one point accusing one of the jurors of meeting him on the night of the homicide to purchase a stolen radio. The defense again argued that the confession was both coerced and fabricated, pointing to the fact that Mr. Fierro had insisted on adding to his statement a declaration that his parents were completely innocent of any involvement. Mr. Fierro's parents testified that they were detained by the Juárez police, threatened with torture and then abruptly released after their son confessed. The detective admitted that he had provided Mr. Fierro with the "fine points" for his confession, such as the date and location of the crime and the disposition of the body.

102. Nevertheless, on 12 February 1980, Mr. Fierro was convicted of murder. He was sentenced to death on 15 February 1980.

103. After his sentence was imposed, Mr. Fierro's mother sought the assistance of the Mexican consulate. Since that time, Mexico has provided extensive and ongoing consular assistance to Mr. Fierro. Consular officers have provided Declarations in appellate and post-conviction proceedings testifying that Mexican authorities would have immediately secured the release of his parents from unlawful custody, had they been informed of his arrest. Mexico has submitted a series of *amicus curiae* briefs in support of Mr. Fierro, asserting that his conviction and sentencing under these circumstances were in violation of international law. Mexico also has filed numerous diplomatic protests to the U.S. Department of State regarding the uncontested violation of Article 36 and has supported clemency for Mr. Fierro whenever a new execution date has been set.

104. With the assistance of Mexican consular officers, Mr. Fierro filed a petition for state post-conviction relief, asking the Texas state courts to reconsider his conviction and death sentence in light of the authorities' violation of his Article 36 rights. The court simply ignored the issue.

105. Throughout his state and federal appeals, Mr. Fierro continued to insist on his innocence, declaring that the El Paso police committed perjury to conceal their conspiracy to extract a false confession. However, each appellate court relied on the findings of the pre-trial suppression hearing to conclude that the police had testified truthfully and that the confession was voluntary.

106. In 1994, some fourteen years after the trial, Mr. Fierro finally obtained an evidentiary hearing on the claim of coercion. With the assistance of Mexican consular authorities, Mr. Fierro presented new evidence that included a letter rogatory from Jorge Palacios, the Juárez police commandant who had detained his parents, along with testimony from seventeen witnesses and voluminous documentary evidence. The reviewing court found that:

> At the time of eliciting the Defendant's confession, [the investigating detective] did have information that the Defendant's mother and step-father had been taken into custody by the Juárez police with the intent of holding them in order to coerce a confession from the Defendant, contrary to [the detective's] testimony at the pretrial suppression hearing.

107. The evidence presented led the presiding judge to conclude that "there is a strong likelihood that the Defendant's confession was coerced by the actions of the Juárez police and by the knowledge and acquiescence of those actions" by the El Paso detective. The judge ruled that Mr. Fierro should receive a new trial.

108. The Texas Court of Criminal Appeals unanimously adopted the trial court's findings of fact from the evidentiary hearing, agreeing that Mr. Fierro's "due process rights were violated" by the perjured testimony.

109. However, in a controversial 5-4 opinion, the Court nonetheless held that the violation constituted "harmless error" and refused to order a new trial, on the grounds that Mr. Fierro would have been convicted even

without his confession. This conclusion was squarely rejected by the trial prosecutor, who declared under oath that:

> Had I known at the time of Fierro's suppression hearing what I have since learned about the family's arrest, I would have joined in a motion to suppress the confession. Had the confession been suppressed, I would have moved to dismiss the case unless I could have corroborated [the eye witness] testimony. My experience as a prosecutor indicates that the judge would have granted the motion as a matter of course.

110. The federal courts consistently have adopted the same findings of fact that led to the call for a new trial, but have held that Mr. Fierro is procedurally barred from obtaining relief in the federal courts.

111. The State of Texas has opposed vigorously all efforts to obtain a remedy for the admitted violation of Mr. Fierro's constitutional rights.

112. Just days before his scheduled execution in 1997, the U.S. Court of Appeals for the Fifth Circuit allowed Mr. Fierro to file an additional *habeas corpus* petition to challenge his capital murder conviction on the ground that he was innocent of the crime. Ultimately, however, the Fifth Circuit concluded that Mr. Fierro's claim was procedurally barred, because he had filed his subsequent *habeas* petition shortly after the one-year deadline for such petitions had expired. Despite the fact that Mr. Fierro had complied fully with the briefing schedule set by the district court, his petition on grounds of actual innocence was thus denied as "procedurally defaulted," without any consideration of its merits. A subsequent petition to the United States Supreme Court for a writ of certiorari was denied without comment on 31 March 2003.

113. As Mr. Fierro has now exhausted both his primary and his successive appeals, the State of Texas has declared its intent to schedule his execution in the near future.

3. Carlos Avena Guillen[119]

114. On 15 September 1980, law enforcement authorities of Los Angeles County, California arrested Carlos Avena Guillen, a nineteen-year-old Mexican national. Mr. Avena was a suspect in a series of shootings in Los Angeles three days earlier, in which two people had died.

115. At the time of his arrest, Mr. Avena was registered with the Immigration and Naturalization Service, a fact that would have become apparent during routine verification of his identity by the police. Nonetheless, at no time was Mr. Avena informed of his rights under Article 36. Indeed, Mexican consular officers only became aware of his case more than 11 years after his conviction and sentence.

116. Despite his limited command of English, Mr. Avena was interrogated solely in that language and eventually confessed to the crime. His confession was surreptitiously recorded by police. Nowhere on the recording did the police advise him of his legal rights under U.S. constitutional law to keep silent and to have a lawyer appointed to defend him,[120] nor did they obtain his written consent to waive those rights. Furthermore, it is clear from the transcript of the recording that Mr. Avena attempted to terminate the interview (as he was legally entitled to do), to no avail.

117. At his trial, Mr. Avena pled not guilty. Unable to afford an attorney, he was provided with court-appointed legal counsel on 7 January 1981. For the next eleven months, the appointed attorney spent a total of just 53 hours preparing for his client's capital murder trial. The attorney met with his client four times, conducted no pre-trial

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[119] Case No. 1 in Mexico's Application. For detailed citations of the facts discussed in the case of Mr. Avena, see Declaration of Roberto Rodríguez Hernández, Appendix A, paras. 1-9, Annex 7.

[120] In *Miranda v. Arizona,* 384 U.S. 436 (1966), the United States Supreme Court held that, prior to interrogating a detained suspect, the police must inform him that (1) he has a right to remain silent; (2) anything he says can and will be used against him in a court of law; (3) he has the right to have a lawyer present during questioning; and (4) if he cannot afford a lawyer, one will be appointed for him.

investigation, presented no motions, retained no expert witnesses and failed even to interview Mr. Avena's closest relatives. Despite knowing that Mr. Avena had given a recorded confession, the attorney made no effort to have the statement suppressed before trial and reportedly failed to discuss its contents or circumstances with his client.

118. At trial, Mr. Avena's attorney made no opening statement and presented no witnesses. He did not object to the violation of his client's Article 36 rights. During his brief closing argument, Mr. Avena's attorney conceded the weight of the prosecution's evidence of the murders, declaring that "The tape is right in front of you, literally confessing to shooting down a couple of people... ." Mr. Avena was promptly convicted of both murders.

119. At the sentencing phase, Mr. Avena's attorney called no mitigation witnesses to make the case for a sentence other than death. His closing statement to the jury urged them to feel "no sympathy" for his client and he declared:

> He doesn't have any excuses. He's a bad person. There's no question about that. I submit that. I am not going to argue his good points...I never said anything like that. I understand the defendant that I have here. He doesn't come up here with a good reputation or a lot of kindness or whatever that might be. He doesn't have those things. He's a person that you can't like.

120. The jury recommended that Mr. Avena be sentenced to death. As a California Supreme Court judge later observed dissenting from a decision to deny Mr. Avena habeas relief,

> Having stripped his client of all vestiges of his humanity in the eyes of the jurors, having deprived him of any chance of stirring their compassion or deserving their mercy, [defense counsel] was then reduced to arguing that the jury should spare petitioner simply because some

> murderers are even worse. . . on this record [Mr. Avena] would probably have had a better chance of receiving a sentence of life imprisonment without possibility of parole if his counsel had made no argument at all.

121. On 14 February 1992, eleven years after Mr. Avena's death sentence was imposed, the Mexican consulate in San Francisco received a letter from the warden of the California State Prison in San Quentin stating that Mr. Avena was incarcerated and that prison records indicated he was a Mexican national. Mexican consular officers immediately visited him in prison, and began rendering humanitarian and other assistance.

122. Mr. Avena's counsel failed to raise any Article 36 violations in direct appeal and state post-judgment proceedings. His attorneys have recently filed an additional petition in state court, in which they have raised the violation of Article 36. The petition is still pending.

C. MUNICIPAL LAW BARS

123. With regard to the obligations of the United States under Article 36(2), if and when Mexican consulates learn of the detention, prosecution, and conviction of Mexican nationals, several doctrines of United States municipal law prevent Mexican nationals from obtaining meaningful review of violations of the Vienna Convention. Indeed, not a single Mexican national has obtained a judicial remedy for a violation of Article 36 – due, in large part, to these procedural obstacles.

124. In deference to these procedural rules, three Mexican nationals have been executed since 2000, despite the uncontested violation of Article 36 in their cases. The majority of the Mexican nationals have sought judicial remedies for violations of their Article 36 rights.[121] The courts have denied relief in every petition upon which they have ruled.[122]

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[121] *See* Declaration of Roberto Rodríguez Hernández, Appendix A (detailing cases) , Annex 7.

[122] *Ibid.*

In seven cases, the Article 36 violation has been presented, but is not yet resolved.[123] However, in all but one of those cases, it is virtually certain the courts will find the claim to be procedurally defaulted, since it was never raised at trial. At present, these procedural doctrines effectively preclude Mexican nationals from obtaining a judicial remedy for violations of Article 36.

1. Default Doctrines

125. In the cases before this Court brought by Paraguay and Germany with regard to the Vienna Convention, there was no dispute that the competent authorities of the United States failed to advise Mr. Breard or the LaGrand brothers, respectively, of their rights to consular notification and access.[124] Similarly, in the majority of the fifty-four cases before this Court, there is no credible dispute that the local authorities failed to advise the national "without delay" of his rights under Article 36 of the Convention. Yet in each case in which nationals have petitioned U.S. courts for redress, the courts have refused to provide a remedy. Quite often, the courts have justified this outcome by claiming that the national failed to comply with the applicable procedural requirements for properly raising a claim of an Article 36 violation. This is so even though the national was not previously aware of his rights precisely because the competent authorities failed to provide timely notification under Article 36. Although the Court confronted and rejected this purported justification in *LaGrand* as an independent violation of Article 36(2),[125] U.S. courts have continued to invoke this municipal doctrine to bar review of Article 36 violations.[126]

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[123] *Ibid.*

[124] *See Vienna Convention on Consular Relations (Paraguay* v. *United States of America), Provisional Measures, Order of 9 April 1998*, para. 18; *LaGrand (Germany v. United States of America), Merits, Judgment of 27 June 2001*, para. 15.

[125] *See LaGrand* at para. 15.

[126] Indeed, since the issuance of the *LeGrand* judgment, only one federal trial court has held that procedural default rules should not be invoked to avoid an Article 36 claim. *See Madej v. Schomig*, 223 F. Supp. 2d 968, 978-79 (2002).

a. State Procedural Default Rules

126. The fifty-four Mexican nationals described herein were prosecuted in ten different states, each of which has its own rules governing the procedures a criminal defendant must follow in order to properly raise and preserve a claim for relief. Under these state laws of procedural default, an otherwise meritorious claim is considered defaulted where the defendant (or his lawyer) did not follow the proper procedures in raising that claim. In most cases, once a state court has made such a determination, the legal argument cannot be resurrected in later proceedings in state or federal court. Courts have repeatedly held that foreign nationals, including several of the fifty-four nationals whose cases gave rise to these proceedings, have procedurally defaulted – that is, they have forever waived – meritorious claims under the Vienna Convention.[127]

b. Federal Procedural Default Rules

127. As the Court is aware from the *LaGrand* case, the procedural default doctrine in federal court operates in a similar way to thwart Mexican nationals from vindicating their rights under the Convention.

c. Non-Retroactivity: *Teague v. Lane*

128. Even if a Mexican national is able successfully to navigate the procedural default doctrines he must also overcome the non-retroactivity doctrine, known as the *Teague* doctrine.[128] Under this doctrine, a federal court may not grant a prisoner *habeas* relief based on new rules of criminal procedure announced after the prisoner's direct appeal

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[127] *See, e.g., State v. Reyes-Camarena*, 7 P. 3d 522, 524-26 (Or. 2000) (*en banc*) (state court decision denying Vienna Convention claim made by Mexican national in a capital case because, *inter alia*, he had failed to raise the claim in the trial court); *see also Valdez v. State*, 46 P. 3d 703, 707-710 (Okla. Crim. App. 2002) (state court decision denying Vienna Convention claim based on procedural default, despite determining that the trial and appellate counsel had been constitutionally deficient in failing to present certain mitigating evidence, which the efforts of Mexican consular officers had uncovered).

[128] *See Teague v. Lane*, 489 U.S. 288 (1989).

proceedings are completed.[129] Thus, the non-retroactivity doctrine comes into play when the prisoner attempts to rely on a new rule of criminal procedure in federal *habeas* proceedings.

129. A case announces a new rule of procedure "if the result was not *dictated* by precedent existing at the time the defendant's conviction became final."[130] Federal courts have consistently held that claims under the Vienna Convention raise a new rule of law that is not available in federal *habeas* proceedings.[131] As a result, the *Teague* doctrine assures that a foreign national is unable to vindicate his claim under the Vienna Convention.[132]

2. Denial of Rights-Based Remedies

130. Further, even if the claims of Mexican nationals are not barred by procedural default, federal and state courts hearing such challenges have failed to provide any effective judicial remedies. Specifically, in at least ten cases, the courts have uniformly refused to provide remedies such as *vacatur* of the conviction, *vacatur* of the death sentence, dismissal of the indictment, or even the suppression of self-incriminating statements garnered by authorities in proceedings tainted by acknowledged violations of Article 36 of the Vienna Convention.[133]

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[129] The completion of all direct appeal proceedings is further defined under United States law based on whether the petitioner seeks Supreme Court review of the case.

[130] *Teague*, 489 U.S. at 301 (emphasis in original).

[131] *See, e.g.*, Annex 56 (case of Plata) (judicial decision refusing to recognize Vienna Convention as creating a "personally-enforceable right" because such a finding "would create a new of law, violating the principles of Teague.").

[132] Like the procedural default doctrine, the *Teague* doctrine is subject to limited exceptions. However, no court has ever held, and no prosecutor has ever conceded, that claims under the Vienna Convention would fall within these exceptions.

[133] Arturo Juárez Suárez (No. 9), Juan Dedios Ramírez Villa (No. 20), Juan Ramón Sanchez Ramírez (No. 23), Eduardo David Vargas (No. 26), Ramiro Hernandez Llanas (No. 33), Juan Carlos Alvarez (No. 29), Félix Rocha Diaz

Moreover, the practice in U.S. courts in this regard has not changed since this Court's decision in *LaGrand*.

131. The courts' failure to provide a judicial remedy rests upon three basic holdings.

a. No Individual Rights

132. *First*, despite the United States Supreme Court's statement in *Breard* that Article 36 "arguably" creates individual rights[134] and this Court's finding in *LaGrand*,[135] federal and state courts considering the issue have found that the Vienna Convention does not confer individual rights on foreign nationals, and accordingly, a detained foreign national has no ability to vindicate his rights in a United States court.[136]

b. No Fundamental Rights

133. *Second*, state and federal courts have found that even assuming *arguendo* that the Vienna Convention creates individual rights, those rights are not "fundamental" rights on par with constitutional rights (e.g., the right to counsel) and do not justify judicial relief such as the dismissal of the indictment or the suppression of evidence. The judicial relief embodied in the suppression of evidence, in particular, is based upon the application of the constitutional rule of U.S. law that excludes evidence obtained in violation of a defendant's rights under federal or

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(No. 42), Jose Trinidad Loza (No. 52), Gabriel Solache (No. 47), and Ignacio Gomez (No. 32).

[134] *Breard v. Greene*, 523 U.S. 371, 376 (1998).

[135] *LaGrand, Judgment*, at para. 77.

[136] *See, e.g., U.S. v. De La Pava*, 268 F.3d 157, 164-65 (2d Cir. 2001) (finding that international law, the text of the Vienna Convention itself, and the Senate ratification hearings support the view that the Convention creates no judicially enforceable individual rights); *U.S. v. Emuegbunam*, 268 F.3d 377, 392 (6th Cir. 2001), cert. denied, 122 S. Ct. 1450 (2002) (same); *Bell v. Commonwealth*, 563 S.E.2d 695, 706 (Va. 2002) (denying the creation of enforceable individual rights under Vienna Convention); *State v. Martinez-Rodriguez*, 33 P.3d 267, 273 (N.M. 2001) (same).

state law (the so-called "exclusionary rule"). The general rule in federal and state courts is that neither the dismissal of the indictment nor the suppression of incriminating statements obtained from a foreign national are available remedies under the Convention. [137]

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[137] For federal cases, by Circuit, *see United States v. Nai Fook Li*, 206 F.3d 56, 61 (1st Cir. 2000) (*en banc*) (holding that even if Vienna Convention confers individual rights on foreign nationals, appropriate remedies do not include suppression of evidence or dismissal of an indictment because the treaty does not create "fundamental rights on par with the right to be free from unreasonable searches, the privilege against self-incrimination, or the right to counsel"), *cert. denied*, 531 U.S. 956 (2000); *United States v. De La Pava*, 268 F.3d 157, 165 (2d Cir. 2001) (government's failure to comply with the Vienna Convention does not justify the extraordinary remedy of dismissal of an indictment because Article 36 rights do not qualify as "fundamental"); *Murphy v. Netherland*, 116 F.3d 97, 99-100 (4th Cir.) (*habeas corpus* petitioner does not make "a substantial showing of the denial of a constitutional right," the precondition for obtaining appellate review, by asserting violation of his Vienna Convention rights), *cert. denied*, 118 S.Ct. 26 (1997); *United States v. Jimenez-Nava*, 243 F.3d 192 (5th Cir.) (Vienna Convention creates no judicially enforceable rights, but even assuming the contrary, suppression of evidence would be an inappropriate remedy), *cert. denied*, 533 U.S. 962 (2001); *United States v. Page*, 232 F.3d 536, 540-41 (6th Cir.) (even if Vienna Convention confers rights on foreign nationals, the nature of those rights does not justify the judicially created remedies of dismissal of an indictment or suppression of evidence), *cert. denied* 532 U.S. 935 (2001); *United States v. Chaparro-Alcantara*, 226 F.3d 616, 620-24 (7th Cir.) (even if Vienna Convention confers rights on foreign nationals, suppression of evidence is not the appropriate remedy for a violation of those rights), *cert. denied*, 531 U.S. 1026 (2000); *United States v. Lawal*, 231 F.3d 1045, 1048 (7th Cir. 2000) (reaffirming *Chaparro-Alcantara* and asserting that Article 36 of the Vienna Convention does not provide such an "extraordinary remedy"), *cert. denied*, 531 U.S. 1182 (2001); *United States v. Lombera-Camorlinga*, 206 F.3d 882, 885 (9th Cir.) (*en banc*) (even if Vienna Convention creates individually enforceable rights, the exclusion of evidence in a criminal proceeding is not among them), *cert. denied*, 531 U.S. 991 (2000); *United States v. Cordoba-Mosquera*, 212 F.3d 1194, 1196 (11th Cir.) (even if Vienna Convention creates rights enforceable by individuals, court would follow the lead of other circuits in holding that available remedies do not include suppression of evidence or dismissal of an indictment), *cert. denied*, 531 U.S. 1131 (2001). *See also United States v. Duarte-Acero*, 296 F.3d 1277, 1281-82 (11th Cir. 2002)(deferring to the U.S. State Department view that "the only remedies for a violation of the Vienna Convention are diplomatic, political, or derived from international law.").

3. Prejudice Requirement

134. *Third,* some courts have circumvented the previous issues by finding that even assuming Article 36 provides for an individual right and creates a fundamental right permitting a judicial remedy such as exclusion, the defendant would still not be entitled to such remedies absent a showing of prejudice; that is, that the violation harmed his interests in such a way as to affect the outcome of the proceedings.[138]

For state cases, *see, e.g., State v. Buenaventura,* 660 N.W.2d 38, 45 (Iowa 2003) (Iowa state court case adopting a rule that the exclusionary rule never applies to evidence obtained in violation of Article 36); *People v. Lopez*, 2002 WL 31898309, slip op. at *3 (No. G027444) (Cal. App. 4 Dist. 2002) (California state court holding that exclusionary rule does not apply to violations of the Vienna Convention); *Lopez v. State*, 558 S.E.2d 698, 700 (Ga. 2002) (Georgia state court finding that even if the Vienna Convention creates a privately enforceable right, nothing in its text requires the application of the exclusionary rule, and such a judicially-created remedy cannot be imposed absent a violation of a constitutional right); *State v. Chavez,* 19 P.3d 923, 925 (Or. 2001) (Oregon state court holding the exclusionary rule does not apply to Vienna Convention violations); *Zavala v. State*, 739 N.E.2d 135, 138-43 (Ind. 2000) (Indiana state court holding same); *People v. Corona*, 108 Cal. Rptr.2d 210, 211-12 (2001) (California state court holding same); *Rocha v. State*, 16 S.W.3d 1, 13, 19 (Tex. Crim. App 2000) (Vienna Convention, and indeed all international treaties, do not create "laws" within the meaning of Texas state statute that excludes evidence obtained in violation of the constitution or laws of Texas or the United States).

[138] *See, e.g., United States v. Santos*, 235 F.3d 1105, 1107-08 (8th Cir. 2000) (even if Vienna Convention confers judicially enforceable rights on foreign nationals, and even if the remedy for violations of those rights includes suppression of evidence, defendant foreign national's delay in exercising his Vienna Convention rights and the overwhelming evidence against him made any possible violation "harmless error"); *United States v. Ortiz*, 315 F.3d 873, 887-88 (8th Cir. 2002); *United States v. Minjares-Alvarez*, 264 F.3d 980, 987-88 (10th Cir. 2001) (post-*LaGrand*, finding defendant failed to show prejudice from the violation); *United States v. Cordoba-Mosquera*, 212 F.3d 1194, 1195-96 (11th Cir. 2000) (same), *cert. denied*, 531 U.S. 1131 (2001). *See also Breard v. Greene*, 523 U.S. 371, 377 (1998) ("[I]t is extremely doubtful that the [Vienna Convention] violation should result in the overturning of a final judgment of conviction without some showing that the violation had an effect on the trial.").

135. Invariably, the courts have applied a high threshold of proof of actual prejudice and have found the defendant failed to make that showing. In many cases, the federal courts have assumed that foreign nationals' right to be notified of the availability of consular assistance is superfluous when they have been notified of all United States constitutional and statutory rights, including the right to counsel.[139] Accordingly, a defendant is put into the difficult position of establishing that any advice rendered by the consulate would have been of assistance to him beyond his existing knowledge of rights garnered from *Miranda* warnings and/or defense counsel, and that furthermore, he would have followed whatever advice the consulate provided.[140]

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[139] *See, e.g., United States v. Rodriguez*, 68 F.Supp.2d 178, 183-84 (E.D.N.Y. 1999) ("Prejudice has never been—nor could reasonably be—found in a case where a foreign national was given, understood, and waived his or her *Miranda* rights."). *But see* United States State Department, Pub. No. 10518, *Consular Notification and Access: Instructions for Federal, State and Other Local Law Enforcement and Other Officials Regarding Foreign Nationals in the United States and the Rights of Consular officers to Assist Them* (released Jan. 1998) at 19-20. In response to the question of whether a foreign national must be given consular notification, even if the *Miranda* warning was given, the handbook directs that:

> Consular notification should not be confused with the *Miranda* warning, which is given regardless of nationality to protect the individual's constitutional rights against self-incrimination and to the assistance of legal counsel. Consular notification is given as a result of international legal requirements, so that a foreign government can provide its nationals with whatever consular assistance it deems appropriate. You should follow consular notification procedures with respect to detained foreign nationals in addition to providing Miranda or other warnings required. *Id.*

[140] *See, e.g., United States v. Moreno*, 122 F. Supp. 2d 679, 683-84 (E.D.Va. 2000) (finding no prejudice where defendant was provided proper notice of his *Miranda* rights, validly waived them, and failed to demonstrate how consular assistance would have affected his decision to waive those rights); *United States v. Rodriguez*, 68 F.Supp.2d 178, 184 (E.D.N.Y. 1999) (finding that prejudice can never be found where a foreign national was given, understood and waived his *Miranda* rights, because the advice a consular official would give would simply augment the content of *Miranda*); *United States v. Alvarado-Torres*, 45 F. Supp. 2d 986, 990-91 (S.D. Cal. 1999) (same). Indeed, despite the dozens of

136. In short, municipal default doctrines operate to preclude Mexican nationals from obtaining effective remedies based on violations of the Vienna Convention. Further, even where United States courts do not find the Vienna Convention claims to be procedurally barred, they have found that no judicial remedy is available to address those accepted violations. Finally, since the *LaGrand* decision was issued, no changes have taken place in the practices of state and federal courts to provide meaningful review for acknowledged violations of the Vienna Convention.[141]

D. MEXICO'S JUDICIAL AND DIPLOMATIC EFFORTS

137. Prior to filing its Application, Mexico repeatedly sought relief for violations of Article 36 in the United States courts and with the United States Executive Branch. Mexico also sought relief in the Inter-American Court of Human Rights. None of these efforts has been availing.

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cases in which U.S. courts have considered the issue, only two courts have found prejudice based explicitly on the Vienna Convention violations. *See State v. Reyes*, 1999 WL 743598, *3 (Del. Super., 1999) (prejudice found where the State conceded that defendant was not informed of his consular notification rights and defendant made incriminating statements which the State sought to introduce in its case-in-chief; motion to suppress upheld); *Valdez v. State*, 46 P.3d 703 (Okla. Crim. App. 2002) (case remanded for resentencing upon finding a reasonable probability that the jury would not have imposed the death penalty had defendant had the benefit of consular assistance, a thorough background investigation and adequate legal representation).

[141] *See* J. Fitzpatrick, The Unreality of International Law in the United States and the *LaGrand* Case, 27 *Yale Journal of International Law* (2002)at p. 428 (concluding that of the eight decisions involving uncontested Convention violations rendered by the federal courts of appeal after the *LaGrand* decision and before March 2002, not one provided any remedy to the defendant foreign national); A. Bishop, The Unenforceable Rights to Consular Notification and Access in the United States: What's Changed Since the *LaGrand* Case?, 25 *Houston Journal of International Law* (2002) at p.91 ("Since the LaGrand decision was issued, no visible changes have taken place in the practices of state and federal governments to ensure that foreign nationals' consular rights are protected.").

1. Efforts by Mexico Before Judicial Authorities of the United States

138. In order to prevent the executions of its nationals whose Article 36 rights were violated, Mexico has repeatedly intervened in the state and federal courts of the United States. For example, in 1997, Mexico filed suit in its own right in United States federal court. The federal court dismissed the lawsuit, and the court of appeals affirmed this decision, finding that Mexico's suit was barred by the Eleventh Amendment to the United States constitution.[142] Pursuant to this holding, neither Mexico nor its consular officers can gain access to the federal judicial forum in which to seek vindication of their rights under the Vienna Convention.

139. In addition, Mexico has filed at least sixteen *amicus curiae* briefs on behalf of its nationals over the last three years. Thus far, Mexico's legal arguments have failed to persuade any United States court that when the authorities violate Article 36 in a capital murder

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[142] *United Mexican States v. Woods*, 126 F.3d 1220 (9th Cir. 1997), *cert. denied* 523 U.S. 1075 (1998). Mexico had sought an injunction to prevent the execution of Ramon Martinez-Villareal, who the United States conceded had been convicted and sentenced in Arizona proceedings that did not comport with the Vienna Convention. In dismissing the suit, the court of appeals held that a suit to prevent an execution that had not yet occurred was actually a suit for retrospective relief barred by the Eleventh Amendment of the United States constitution and did not fall into any exceptions to the bar. *Id.*, 126 F.3d at 1223; *accord Paraguay v. Allen*, 134 F.3d 622 (4th Cir.) (affirming the district court's dismissal of action by Paraguay alleging violations of its Vienna Convention rights on Eleventh Amendment grounds), *cert. denied sub nom Breard v. Greene*, 523 U.S. 371 (1998); *see also Consulate General of Mexico v. Phillips*, 17 F. Supp. 2d 1318 (S.D.Fl. 1998). The United States Supreme Court did not consider the merits of the dismissal of Mexico's suit. However, in response to similar suits brought by Paraguay and Germany, the Supreme Court did state in *dicta* that a foreign state's suit to enjoin an imminent execution of one of its nationals based upon a Vienna Convention violation did not constitute circumstances sufficient to defeat Eleventh Amendment immunity. *Breard v. Greene*, 523 U.S. 371, 377-78 (1998); *Federal Republic of Germany v. United States*, 526 U.S. 111, 112 (1999) (declining to exercise original jurisdiction over Germany's suit against Arizona based on Vienna Convention violations because, *inter alia*, it would be "in probable contravention of Eleventh Amendment principles").

prosecution, they must provide a meaningful remedy for the violation. Moreover, Mexico has failed to persuade any U.S. court that, under the *LaGrand* decision, the United States courts may not apply municipal bars such as the procedural default doctrine to prevent "review and reconsideration" of the national's conviction and sentence.

2. Diplomatic Démarches

140. Over the past decades, Mexico has also pursued numerous diplomatic and political channels to enlist the assistance of the Executive Branch of the U.S. Government in remedying violations of the Vienna Convention and ensuring their non-repetition. Specifically, Mexico has filed diplomatic notes in at least twenty capital cases involving Mexican nationals over the last six years.[143] In each note, Mexico reiterated the vital nature of the rights to consular notification and access, expressed its view that violations of Article 36 are incompatible with international law, and requested that those views be conveyed to local authorities.

141. One of the earliest capital cases that resulted in an execution despite Mexico's protests was that of Irineo Tristan Montoya, who was executed by the State of Texas on 18 June 1997. In the fifteen months prior to Mr. Montoya's execution, Mexico filed four diplomatic protests with the United States Department of State in which Mexico raised the Vienna Convention violations.[144] Nevertheless, the United States failed to respond to the notes before Mr. Montoya's execution.

142. The day following Mr. Montoya's execution, Mexico filed a fifth diplomatic note, protesting the execution and the failure of the United States to respond to its previous notes.[145] In that note, Mexico

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[143] *See* Annexes 8-26.

[144] Specifically, in emphasizing that competent authorities of Texas had failed to comply with Article 36(1)(b), Mexico formally requested that the Texas Board of Pardons and Paroles commute Mr. Montoya's sentence and sought, at a minimum, a thirty-day reprieve from the Governor of Texas in order to allow time for a full investigation of the circumstances of the consular rights violation. *See* Diplomatic Notes from Notice to United States Department of State: Note 000409 of 14 March 1996; Note 00067 of 6 May 1997; Note DAN-01657 of 11 June 1997; Note 00087 of 17 June 1997, Annex 16.

[145] *See* Diplomatic Note 000896 of 19 June 1997, Annex 16.

specifically observed that the United States had failed to provide information to the United States courts regarding the violations of Article 36 and requested that the United States adopt necessary measures to prevent "new irreparable events such as the one which occurred yesterday."[146]

143. On 9 July 1997, the United States apologized for the execution of Mr. Montoya.[147] Mexico filed a sixth diplomatic note in response.[148] In this final note, Mexico thanked the United States for its apology, but reiterated its view that the United States needed to do more, particularly in capital cases, to vindicate the rights contained in Article 36. Mexico observed that, as of 5 August 1997, there were thirty-six cases of Mexican nationals sentenced to death in the United States, and that in all of those cases the competent authorities had failed to comply with Article 36. Mexico noted that its concern over the violations was mounting, given the increased number of Mexican nationals who had been sentenced to death without being promptly advised of their rights to consular notification and access. Mexico also advised the United States of its view that the violations of Article 36 undermined its nationals' due process rights. Mexico requested that the United States make its position clear before state authorities and the United States courts with regard to the violations of Article 36. Finally, Mexico requested a guarantee that in future cases, Mexico be duly notified by state authorities whenever one of its nationals was detained and charged with a capital crime.[149]

144. Notwithstanding Mexico's efforts, neither the Executive Branch of the federal government nor the competent authorities of the State of Texas took any steps to ensure meaningful review and reconsideration of Mr. Montoya's case. Instead, United States authorities refused to allow even a temporary stay of the execution, and the Texas state authorities expressed the view that it was not their

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[146] *Id* (unofficial English translation).

[147] *See* Diplomatic Note 001118 from Mexico to United States Department of 5 August 1997, Annex 16.

[148] *Id.*

[149] *Id.*

responsibility to determine whether there had been a violation of the Vienna Convention, since Texas had not signed the treaty.[150]

145. Less than three months later, on 18 September 1997, the State of Virginia executed Mexican national Mario Benjamin Murphy. Mexico had filed a diplomatic protest with the Department of State regarding Mr. Murphy's case in June 1997.[151] In that protest, Mexico informed the State Department that not only did Virginia state authorities fail to inform Mr. Murphy of his right of consular access upon his arrest, but state prison officials subsequently refused his request to contact the consulate.[152] Again, Mexico formally requested commutation of the sentence.[153]

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[150] *See* Declaration of Roberto Rodríguez Hernández, para. 28, Annex 7.

[151] *See* Diplomatic Note 000948 from Mexico to United States Department of State of 25 June 1997, Annex 17.

[152] Diplomatic Note 001394 from Mexico to United States Department of State of 25 September 1997, Annex 17.

[153] *See* Diplomatic Note 001275 from Mexico Embassy to U.S. State Department of 8 September 1997, Annex 17; Diplomatic Note 001308 from Silva Herzog, Mexican Ambassador to Assistant Secretary for Inter-American Affairs, U.S. State Department of 10 September 1997. In conversations with the Ambassador of Mexico to the United States, the United States opined that the outcome of Mr. Murphy's case was not affected by the violation. In response to this opinion, the Ambassador sent a letter to the United States urging the United States to join Mexico in requesting a commutation because:

> In any given case whether a foreign national's case would be affected by denial of his Article 36 rights will always be a matter of conjecture. . . . From our perspective, as a foreign Government, the question whether the United States has complied with its international legal obligations under the Vienna Convention is even more important. That treaty gives foreign nationals Article 36 rights in every instance and the very denial of these rights should be protected irrespective of whether in any case their exercise would 'have affected the outcome' of any given matter.

146. State and federal authorities of the United States took no action in response to this protest. After Virginia executed Mr. Murphy, the Department of State apologized to Mexico.[154]

147. Three years later, on 9 November 2000, the State of Texas executed Mexican national Miguel Angel Flores. In that case, Texas officials conceded that they had violated Mr. Flores's rights under Article 36(1)(b). Again, Mexico protested formally to the Department of State and made diplomatic overtures to Texas state authorities.[155] Again, Mexico sought a commutation of Mr. Flores's sentence or a reprieve of his execution.[156] This time, Mexico took the further steps of sending diplomatic representatives to meet with the Chairman of the Texas Board of Pardons and Paroles, as well as supporting Mr. Flores's petition to the Inter-American Commission on Human Rights, which issued precautionary measures.[157] Finally, Mexico sought aid from other foreign states, and the governments of Argentina, Chile, Honduras,

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Diplomatic Note 001308 from Silva Herzog, Mexican Ambassador to Assistant Secretary for Inter-American Affairs, U.S. State Department of 10 September 1997, Annex 17.

[154] *See* Declaration of Roberto Rodríguez, para. 29, Annex 7. One week after the execution, Mexico filed another diplomatic note, observing that an apology was an insufficient remedy for a violation of Article 36 in a capital case. Mexico conveyed to the United States its strong opinion that the United States must take "specific actions" to guarantee compliance with Article 36. Furthermore, Mexico noted that the United States should take a more active role in enforcing the Vienna Convention in the United States courts, since it was responsible for ensuring compliance with the provisions of the Convention. Mexico reiterated that there were still 35 Mexican nationals remaining on death row, all of whom had been deprived of their rights to consular notification. *See* Diplomatic Note 001308 from Silva Herzog, Mexican Ambassador to Assistant Secretary for Inter-American Affairs, U.S. State Department of 10 September 1997 (referencing the apology of the United States), Annex 7.

[155] *See* Diplomatic Note 001205 from Mexican Embassy to U.S. State Department of 14 November 2000, Annex 11.

[156] *Id.*

[157] *See* Inter-American Commission on Human Rights, Press Communiqué, No. 17/100, dated 13 November 2000, para. 3.

Panama, Poland, Spain, Switzerland and Uruguay, as well as the European Union, intervened diplomatically on its behalf.[158]

148. Again, U.S. federal and state authorities took no meaningful action to ensure review of the proceedings by which Mr. Flores was convicted and sentenced or to stay the execution. After Texas executed Mr. Flores, the Department of State, by a note dated 9 November 2000, apologized to Mexico for the failure of Texas authorities to comply with Article 36 of the Vienna Convention in the case of Mr. Flores.[159]

149. In the recent cases of Mexican nationals Gerardo Valdez and Javier Suárez Medina, whose executions were scheduled to occur after this Court's ruling in *LaGrand*, the only action taken by the United States in response to Mexico's extensive diplomatic efforts was to send terse letters to the state clemency authorities in each case, requesting that they "consider" the Article 36 violations.

150. Specifically, in the case of Gerardo Valdez, it is undisputed that Mr. Valdez was arrested, detained, tried, convicted, and sentenced to death by the State of Oklahoma without receiving notification of his Article 36 rights.[160] Mexico filed a diplomatic note protesting the violation and Consular officers immediately assisted Mr. Valdez in the only way possible at that stage: intervention before the Oklahoma Board

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[158] *See* Declaration of Roberto Rodríguez Hernández, para. 30, Annex 7.

[159] *See* Diplomatic Note from U.S. State Department to Embassy of Mexico of 9 November 2000, Annex 11.

[160] *See Oral Argument, Avena and Other Mexican Nationals (Mexico v. United States)*, para. 3.12 (argument of Catherine Brown, U.S. State Dep't). Mexico first learned of Valdez's arrest in April 2001, only two months before his scheduled execution date, when one of Mr. Valdez's relatives contacted the Mexican consulate. By conducting a brief but thorough investigation of Mr. Valdez's history, Mexico discovered that he had suffered brain damage and other trauma that should have been presented to the Oklahoma jury as mitigating evidence relevant to its decision whether to sentence Mr. Valdez to death. Specifically, upon learning of Mr. Valdez' impending execution, Mexico hired experienced counsel, an investigator and a bilingual neuropsychologist to assist Mr. Valdez. *See* Declaration of Roberto Rodríguez Hernández, para. 31, Annex 7.

of Pardons and Paroles.[161] Based on new evidence uncovered by Mexico, Oklahoma's Board of Pardons and Paroles, after holding a public hearing with the presence of Mexican diplomatic representatives, recommended that Valdez's sentence be commuted to life imprisonment.[162] At the request of President Vincente Fox, Oklahoma's Governor, Frank Keating, granted a 30-day reprieve to study the case, during which this Court issued its decision in the *LaGrand* case. Mexico then sent a Delegation headed by the Foreign Ministry's Legal Advisor to meet with Governor Keating and explain Mexico's views on the case.

151. Following the issuance of the judgment in the *LaGrand* case, the State Department, in a perfunctory gesture similar to that made to the Governor of Virginia in the *Breard* case, "requested" that Governor Keating consider whether the Vienna Convention violation "had any prejudicial effect on either Mr. Valdez's conviction or his sentence."[163]

152. After receiving the letter from the State Department, Governor Keating rejected the Board's recommendation and denied clemency. In his letter to the President of Mexico explaining his reasons for denying clemency, Governor Keating stated:

> Taking the decision in LaGrand into account, I have conducted this review and reconsideration of Mr. Valdez's conviction and sentence by taking account of the admitted violation of Article 36 of the Vienna Convention regarding consular notification... While it is true that Mr. Valdez was not notified of his right to contact the Mexican Consulate in clear violation of Article 36 of the Vienna Convention on Consular Relations, that violation, while regretful and inexcusable, does not, in and of itself, establish clearly discernible prejudice or that a different conclusion would have been

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[161] *See* Diplomatic Note 000445 from Mexican Embassy to U.S. State Department of 10 May 2001, Annex 26.

[162] *See* Declaration of Roberto Rodríguez Hernández, para. 38, Annex 7.

[163] *Letter from William H. Taft IV, Legal Advisor for the U.S. Department of State to Frank Keating, Governor of Oklahoma*, July 11, 2001, Annex 26.

reached at trial or on appeal of Mr. Valdez's conviction or sentence.[164]

153. Oklahoma's court of last resort, moreover, refused to respect the ruling in *LaGrand* that the municipal law doctrine of procedural default must not be applied in a manner that bars consideration of the Vienna Convention violations.[165]

154. On 14 August 2002, the State of Texas executed Mexican national Javier Suárez Medina. Again, Mexico had sent diplomatic notes, both in 1997 and in 2002, protesting the violations of Mr. Suárez's Vienna Convention rights.[166] Mexico's Foreign Minister communicated Mexico's concerns directly to the United States Secretary of State, and the President of Mexico personally communicated with the Governor of Texas to request a reprieve. Mexico also sent diplomatic representatives to meet with the Secretary of State of Texas and with the Chairman of the Texas Board of Pardons and Paroles. Additionally, Mexico supported Mr. Suárez's petition to the Inter-American Commission on Human Rights, which resulted in the issuance of precautionary measures

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[164] *Letter from Governor Keating to the Hon. Vicente Fox Quesada, President of Mexico*, July 20, 2001, Annex 26.

[165] *See Valdez*, 46 P.3d at 707-09. The court ultimately determined, in an unprecedented decision, that Valdez's trial and appellate counsel had been constitutionally ineffective for failing to discover and present the mitigating evidence uncovered by Mexico's efforts. It was on this basis, not on the basis of the violation of Article 36, that the court ordered the Oklahoma trial court to re-sentence Valdez. *Id.* at 710.

[166] *See* Diplomatic Note from Mexican Embassy to U.S. State Department of 31 October 1997; Diplomatic Note from Mexican Embassy to U.S. State Department of 17 July 2003, Annex 25. Prior to the diplomatic efforts, Mexico had vigorously supported Mr. Suárez's efforts to obtain judicial review of his Article 36 violation, filing *amicus curiae* briefs in the Texas Court of Criminal Appeals and the United States Supreme Court. When the Texas court invoked the municipal doctrine of procedural default to avoid reaching the merits of the claim, Mexico and 13 other nations filed an *amicus* brief in support of Mr. Suárez's petition for review with the United States Supreme Court. *See* Declaration of Roberto Rodríguez Hernández, para. 32, Annex 7. The Supreme Court denied review of the case.

by the Commission. At Mexico's behest, Argentina, Brazil, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Panama, Paraguay, Poland, Slovenia, Spain, Switzerland, Uruguay, Venezuela, the Holy See, and the European Union supported Mr. Suárez's efforts before judicial and administrative authorities to obtain meaningful review and reconsideration of the admitted violation of his rights under Article 36(1)(b).[167]

155. The United States did not provide such review, nor did it stay the proceedings. Instead, the State Department, in another perfunctory gesture, sent a letter to the Texas Board, conveying the Department's "request" that the Board give "specific attention" to the acknowledged violation of Mr. Suárez's Article 36(b) rights.[168] Without discussion amongst the members of the Board, or convening a hearing, or even responding to Mr. Suarez's request for a hearing, the seventeen members of the Board voted by fax to deny the commutation. There is no record of any deliberations and contrary to the State Department's advice, the Board provided no written explanations for their action.[169]

3. Action in the Inter-American Court of Human Rights

156. Faced with the continuing pattern and practice of Vienna Convention violations by United States authorities, Mexico sought a declaration of its rights in the Inter-American Court of Human Rights in December 1997. In that case, the United States argued, *inter alia*, that the failure of a receiving state to notify a detained foreign national of his

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[167] Declaration of Roberto Rodríguez Hernández, para. 32, Annex 7.

[168] *Letter from William H. Taft IV, Legal Advisor for the U.S. Department of State to Gerald Garrett, Chairman, Texas Board of Pardons and Paroles,* August 5, 2002, Annex 25.

[169] As a result of the execution of Mr. Suárez, the President of Mexico cancelled his announced official visit to Texas formally to protest the violation of international law. *See* Declaration of Roberto Rodríguez Hernández, para. 39, Annex 7. In a press release issued on the day of the execution by the Office of the President, the position of Mexico on Article 36 was reiterated. The Department of State did not apologize to the Government of Mexico for the violations committed in this case. *See ibid.*

consular rights may only properly result "in diplomatic measures that seek to address such a failure and improve future compliance."[170]

157. The Inter-American Court rejected the United States' position. In Advisory Opinion OC-16/99, that Court held that failure to respect the right to consular assistance established by Article 36(1)(b) of the Vienna Convention would prejudice the due process rights of foreign nationals such that the imposition of capital punishment under such circumstances would violate the human right not to be deprived of life arbitrarily.[171] That violation, the Court found, gives rise to international responsibility and the obligation to provide reparations.[172]

158. The Inter-American Court's decision has had no apparent effect on the policy and practice of the United States. After the Inter-American Court issued its Advisory Opinion, several foreign nationals attempting to vindicate their consular rights sought to rely upon this ruling in U.S. courts, to no avail. The federal courts considering the issues dismissed the relevance of the Advisory Opinion and held that Convention violations could not be remedied by the U.S. judiciary.[173]

E. UNITED STATES'S CONTINUING VIOLATIONS OF ARTICLE 36 OF THE VIENNA CONVENTION

159. All of the nationals named in Mexico's Application were arrested prior to this Court's ruling in *LaGrand*.[174] Mexico is entitled to

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[170] *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion OC-16/99 of 1 October 1999, Inter-Am. Ct. H.R. (Ser A) No. 16, para. 26 (1999).

[171] *Id*, para. 141(7).

[172] *Ibid.*

[173] *See, e.g., United States v. Li*, 206 F.3d 56, n. 4 (1st Cir. 2000) (*en banc*) (dismissing relevance of the Advisory Opinion by noting "the United States is not a party to the treaty that formed the [Inter-American Court of Human Rights], and is not bound by that court's conclusions.").

[174] Two nationals were convicted and sentenced to death after *LaGrand*; Specifically, Mr. Marcos Esquivel Barrera was convicted on 17 July 2001 and

relief for the Article 36 violations in their cases, even if, as the United States maintains, the authorities' compliance with Article 36 has improved in the intervening years.

160. Any claim by the United States that its current compliance with Article 36 is near-universal or has even substantially improved since the decision,[175] however, is belied by the ongoing failure of competent authorities to advise Mexican nationals of their Article 36 rights without delay upon arrest. A comprehensive survey conducted by the Mexican Foreign Ministry of the forty-five Mexican consulates covering jurisdictions throughout the United States reveals that violations of Article 36 remain commonplace, despite *LaGrand*, and despite the United States's efforts to increase compliance.[176]

161. Together, the consulates identified no fewer than 102 cases of Mexican nationals detained on serious criminal charges after 27 June 2001, none of which were notified of their Article 36 rights. In eighty-

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sentenced on 13 December 2001 and Mr. Pedro Hernández Alberto was convicted on 4 November 2001 and sentenced on 28 May 2002.

[175] *Oral Argument 21 Jan. 2003, Case Concerning Avena and Other Mexican Nationals (Mexico v. United States), Rebuttal*, at 10-11 (argument of Catherine Brown):

> [A]ll of the arrests [of Mexican nationals named in the Application] predate the *LaGrand* decision, and many predate our efforts to intensify our compliance efforts which began in the early 1990s. I would also note that Mexico failed to acknowledge that there are literally thousands of Mexicans arrested in the United States each week, and there are hundreds of thousands of Mexicans living in the United States. Viewed in that context, I submit that Mexico has failed to show that there is even a likelihood that a Mexican arrested today in the United States will not be advised of his rights under Article 36.

[176] All forty-five Mexican consulates provided information regarding Mexican nationals detained and charged with serious felonies after the issuance of the *LaGrand* judgment, who were not advised of their rights to consular notification and access. The consulates also provided information with respect to implementation of Article 36 by the competent authorities within each of their jurisdictions. *See* Declaration of Roberto Rodríguez Hernández, paras.42-47 and Appendix B, Annex 7.

nine of the cases, nationals have been charged with homicides; of these, thirty-six could receive the death penalty. The remaining cases involve charges such as attempted murder, assault, and kidnapping. In each of these cases, there is no record of any notification to the national or the consulate. Rather, the relevant consulates became aware of the cases through media reports, contact with the detained national's family or friends, and/or by taking the initiative to review weekly arrest lists supplied by law enforcement authorities.[177]

162. The cases reported by the consulates and described in the Declaration of Ambassador Rodríguez by no means represent the entire universe of cases in which the authorities have violated Article 36. Indeed, the consulates reported additional cases in which the treaty provision was violated, but unless they involved crimes for which the national could face a lengthy term of imprisonment, they were excluded from the attached report. Moreover, Mexico is certain that the consulates are not aware of every case in which the authorities' failed to notify a detained national of his rights to consular notification and access, precisely because of the ongoing violations of Article 36.

163. With regard to overall compliance with Article 36, nineteen consulates[178] reported widespread non-compliance with the treaty provision, and nineteen consulates[179] reported mixed compliance. Only

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[177] *Ibid.*

[178] These consulates are located in Los Angeles (California), San Jose (California), Presidio (Texas), Las Vegas (Nevada), Oxnard (California), Omaha (Nebraska), Detroit (Michigan), Chicago (Illinois), Raleigh (North Carolina), Orlando (Florida), Santa Ana (California), Del Rio (Texas), Miami (Florida), New York (New York), Atlanta (Georgia), Philadelphia (Pennsylvania), Boston (Massachusetts), Portland (Oregon), and Fresno (California).

[179] The consulates are located in San Bernardino (California), Austin (Texas), Houston (Texas), San Antonio (Texas), McAllen (Texas), Brownsville (Texas), El Paso (Texas), Sacramento (California), San Francisco (California), San Diego (California), Calexico (California), Albuquerque (New Mexico), Phoenix (Arizona), Dallas (Texas), Kansas (Kansas), Seattle (Washington), Denver (Colorado), Washington D.C., and Salt Lake City (Utah).

six consulates[180] reported no violations of Article 36, all of them located on or near the Mexican border.[181]

164. Of those consulates detailing mixed compliance, many reported that while notification is received from authorities in a certain limited number of counties within a state, most counties either do not comply at all, or only comply with regard to minor misdemeanor cases.[182]

165. For example, the Sacramento consulate reported that it has never received notification of the detention of a Mexican national in any of the ten counties comprising California's Central Valley, in which the majority of Mexican nationals reside.[183] The Atlanta consulate, which is responsible for 403 counties in four states (Georgia, Alabama, Michigan, and Tennessee), calculated that from the period between January 2002 and 15 April 2003, the consulate became aware of and registered 1,555 detained Mexican nationals in its the consular protection system.[184] In that same period, there were been only 272 notifications from authorities, translating to a level of compliance of roughly 17.49%.[185]

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[180] These consulates are located in Yuma (Arizona), Tucson (Arizona), Nogales (Arizona), Eagle Pass (Texas), Laredo (Texas), and Douglas (Arizona).

[181] One consulate, in Indianapolis (Indiana), opened in November 2002, and could not provide sufficient data regarding compliance.

[182] *See* Declaration of Roberto Rodríguez Hernández, Appendix B, paras. 46-47, Annex 7. Moreover, of those consulates reporting mixed compliance, it appears that federal immigration and criminal authorities comply with article 36 with somewhat greater frequency than their state or local counterparts. The Presidio consulate, for instance, reports that only federal immigration authorities provide written notification to detainees of their consular rights.

[183] *See id.*, paras. 21-29.

[184] *See id.*, paras. 122-130.

[185] *See id.*, para. 125. The number is necessarily an underestimate, as it cannot capture the presumed number of detained Mexican nationals of which the consulate has no knowledge.

166. Similarly, the Philadelphia consulate estimated that it receives notification from competent authorities in only 5 or 6 out of 100 cases.[186] The Miami consulate likewise reported that while two counties regularly provided notifications, eleven did not.[187] The Miami consulate further reported that at times, local authorities have actively prevented detained nationals from communicating with the consulate, despite the nationals' explicit requests to do so.[188]

167. The recent case of Joel Huber Mendoza illustrates the now-familiar litany of the authorities' ongoing failure to notify detained Mexican nationals of their rights pursuant to article 36. On 1 December 2001, Mr. Mendoza was arrested by law enforcement authorities in Stanislaus County, California for triple homicide. Mr. Mendoza has a history of mental instability. The authorities did not inform Mr. Mendoza of his right to consular assistance pursuant to Article 36. Mexican consular officers did not become aware of the case until 8 November 2002, when Mr. Mendoza's defense attorney notified the consulate in order to obtain assistance in his case. It was only after the consulate wrote a letter to the authorities protesting the lack of notification that the authorities issued a letter informing the consulate of Mr. Mendoza's detention, almost one year after his initial arrest. If convicted, Mr. Mendoza may be sentenced to death.

168. Details of each of the 102 cases and the documented article 36 violations are included in the Annexes.[189]

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[186] *See id.*, para. 146.

[187] *See id.*, para. 90.

[188] *See ibid.*.

[189] *See* Declaration of Roberto Rodríguez Hernández, Appendix B, Annex 7.

IV.

VIOLATIONS OF THE VIENNA CONVENTION BY THE UNITED STATES

169. In each of the fifty-four separate cases that form the basis of this action, the United States has violated Mexico's rights under the Vienna Convention, as well as the individual rights of its nationals, which Mexico raises in its exercise of diplomatic protection.[190] *First*, the United States breached the unequivocal language of Article 36(1)(b) by failing to notify the fifty-four Mexican nationals of their consular rights without delay, thereby also depriving Mexico of its right to provide consular protection and assistance to its nationals. *Second*, the United States breached Article 36(2) by employing certain municipal law doctrines to prevent the Mexican nationals from challenging their convictions and death sentences on the basis of the United States's violations of Article 36(1).

A. BY FAILING TO NOTIFY MEXICAN NATIONALS OF THEIR ARTICLE 36 RIGHTS WITHOUT DELAY, THE UNITED STATES VIOLATED ARTICLE 36(1) OF THE VIENNA CONVENTION.

1. Article 36(1) Obligated the United States to Notify Mexican Nationals of their Rights Under The Vienna Convention "Without Delay," Meaning Before Taking Any Action Potentially Prejudicial To the Rights of the Foreign National.

170. The United States does not contest that Article 36(1)(b) required the competent authorities to notify each of the fifty-four Mexican nationals "without delay" of their rights under the Vienna Convention.

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[190] *Mavrommatis Palestine Concessions Case*, P.I.C.J. Series A/No.2; *Barcelona Traction Case*, 1970 I.C.J. Reports; *Interhandel*, 1959 I.C.J. Reports; *Elettronica Siccula*, 1989, I.C.J. Reports.

171. Article 36(1) "establishes an interrelated régime designed to facilitate the implementation of the system of consular protection."[191] Specifically, Article 36(1)(a) provides:

> (a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State.

172. This provision sets forth "the basic principle governing consular protection: the right of communication and access."[192] It constitutes the foundation of consular protection. The consular rights set forth in Article 36(1), and the consular functions enumerated in Article 5,[193] depend on the ability of a consular officer to communicate freely and promptly with the sending State's nationals. As the United States has emphasized, "communication is so essential to the exercise of consular functions that its preclusion would render meaningless the entire establishment of consular relations."[194]

173. Article 36(1)(c) elaborates on "the measures consular officers may take in rendering consular assistance to their nationals in the custody of the receiving State."[195] It provides:

> (c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national

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[191] *LaGrand (Germany v. United States of America), Merits, Judgment of 27 June 2001*, para. 74.

[192] *Id.*, para. 74.

[193] *See* Vienna Convention, Chapter 1, arts. 5(a), (e), (g), (h), (i).

[194] *United States Diplomatic and Consular Staff in Tehran (United States v. Iran), 1980 I.C.J. Pleadings*, p. 174.

[195] *LaGrand*, para. 74.

of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. . . .

174. The notification right embodied in Article 36(1)(b) is the predicate for the exercise of all the other consular rights provided in Article 36. This subparagraph "spells out the modalities of consular notification" and "the obligations of the receiving State toward both the detained person and the sending State."[196]

175. *First*, "competent authorities of the receiving State shall, without delay, inform" any foreign national of the sending State "in prison, custody or detention" of his right to communicate with his consulate.[197]

176. *Second*, if the detained national of the sending State "so requests, competent authorities of the receiving State shall, without delay, inform the consular post of the sending State, if within its consular district, a national of that State [has been] arrested or committed to prison or to custody pending trial or [has been] detained in any other manner."

177. *Finally*, communications from the detained national of the sending State to his consulate shall be forwarded by competent authorities of the receiving State "without delay."

a. The Travaux Préparatoires and U.S. Practice Confirm That "Without Delay" Is a Functional Expression of Immediacy.

178. It is clear that the purpose of Article 36(1) is to ensure immediate consular notification and assistance to any detained foreign national. The timing of the notice is critical to the exercise of the rights provided by Article 36; for this reason, Article 36(1)(b) repeatedly reinforces the necessity of consular notification and access "without delay." Indeed, this phrase appears in every sentence of subparagraph (b).

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[196] *Id.*, paras. 74, 77.

[197] Vienna Convention, art. 36(1)(b).

179. The *travaux préparatoires* for the Vienna Convention confirm that the intent of the phrase "without delay" was to require unqualified immediacy.

180. The original text proposed by the International Law Commission for Article 36(b) employed the phrase "without *undue* delay." The United Kingdom proposed an amendment, which was accepted, deleting the word "undue" to avoid the implication "that some delay [would be] permissible."[198]

181. The Soviet delegate objected to the deletion of the word undue because "[t]he new wording seemed to imply an obligation to supply the information *immediately* . . ."[199] No delegate voiced disagreement with the Soviet Union's interpretation that Article 36(1)(b), after the deletion of "undue," required immediate notification. The *travaux* make clear that other states were quite anxious to get the Soviet Union to agree on a text. If any from the Western bloc had thought that Article 36 did not require immediate notification, they would have said so. They did not.

182. The lack of any temporal definition of "without delay" in Article 36(1)(b), lends further support to the conclusion that notification must be immediate. At the conference, Germany's delegate proposed an amendment by which the "without undue delay" language would have been retained, but qualified by the words "but at the latest within one month."[200] When discussion in the committee made it clear that other states were not willing to allow so long a period to pass without notification, Germany revised its own amendment to change "thirty

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[198] *See Official Records*, Proposals and Amendments Submitted to the Second Committee, at 85, United Kingdom: Amendments to Article 36, 13 March 1963, A/CONF.25/C.2/L.107 (proposal to delete "undue" submitted to the Second Committee); *see also Official Records*, Vol. I, p. 337 (statement of the United Arab Republic) (supporting the United Kingdom's proposal).

[199] Official Records, Vol. I: U.N. Conference on Consular Relations 37, U.N. Doc. A/CONF.25/16 (1963) (Statement of the U.S.S.R.) (emphasis added).

[200] U.N. Doc. A/CONF.25/C.2/L.74, in Official Records, Vol. II: U.N. Conference on Consular Relations 81, U.N. Doc. A/CONF.25/16/Add.1 (1963).

days" to "forty-eight hours."[201] In this revised form, the amendment was put to a vote. Even the forty-eight hour qualification was rejected.[202]

183. The delegates obviously chose to require notification "without delay" rather than specify a particular time period, so as to accommodate the object and purpose of Article 36 of prompt, effective consular protection within the context of the diversity of legal systems that exist among the States party.[203] A specific time period could be ineffective in preventing injury to a foreign national where different municipal systems permitted or required interrogation, court proceedings or other similar actions to be taken in the time prior to the expiration of such a set period. While notification within the forty-eight hours proposed by Germany may ordinarily be understood to constitute notification "without delay," if interrogation takes place immediately after apprehension or detention, even a delay of several hours may violate the purpose and intent of Article 36.

184. By rejecting a 48-hour grace period and deleting "undue" the states participating in the conference made clear that "without delay" meant with *no* delay. Notification pursuant to Article 36(1)(b) must take place at the time the national is first detained.

185. Although the United States has stated that notice within 24 to 72 hours would generally be considered without delay,[204] the U.S.

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[201] Official Records, Vol. II: U.N. Conference on Consular Relation 131, U.N. Doc. A/CONF.25/16/Add.1 (1963).

[202] Official Records, Vol. II: U.N. Conference on Consular Relation 131, U.N. Doc. A/CONF.25/16/Add.1 (1963).

[203] Article 36 was designed to ensure prompt consular notification and assistance in the context of "an international convention on consular relations, privileges and immunities [that] would . . . contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems." *Id.*, pmbl.

[204] U.S. Department of State telegram to all U.S. diplomatic and consular posts abroad concerning consular assistance for American nationals abroad, para. 4, January 1, 2001, available at <http://www.travel.state.gov/notification3.html> (last visited 14 June, 2003).

Department of State has always understood "without delay" to require immediacy, in a qualitative sense, rather than within a certain number of hours or days.

186. The *Foreign Affairs Manual* of the U.S. Department of State explains quite clearly why "[p]ractical considerations make it imperative that the consular officer be notified *immediately* by local authorities whenever a U.S. citizen is arrested."[205] Such immediate notification is essential to the whole regime of effective and meaningful consular protection:

> In order for the consular officer to perform the protective function in an efficient and timely manner, it is essential that the consul obtain prompt notification whenever a United States citizen is arrested. Prompt notification is necessary to assure early access to the arrestee. Early access in turn is essential, among other things, to receive any allegations of abuse [and] to provide a list of lawyers and a legal system fact sheet to prisoners. . . . Without such prompt notification of arrest, it is impossible to achieve the essential timely access to a detained U.S. citizen.[206]

187. Moreover, the actual practice of the United States in serious cases has been to insist on notification and access without *any* delay for its detained nationals, in order to facilitate consular assistance from the earliest stages of the detention. For instance, in 1977, two American missionaries were detained by Salvadoran authorities for taking a photograph of a police station, which was deemed to be a "national security installation" during a "state of siege." The United States did not wait for an arbitrary deadline to expire before responding. Although the authorities released the individuals after 32 hours of detention, the State Department nevertheless lodged a protest note requesting the Salvadoran Minister of Foreign Relations to "elaborate expeditiously" as to

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[205] U.S. Dep't of State, 7 *Foreign Affairs Manual* 400 (emphasis added), Annex 28.

[206] *Id.* at §§ 411, 411.3.

> [w]hy the . . . two United States citizens were not informed of their right to contact the Consulate as provided under Article 36 of the Vienna Convention on Consular Relations of 1963; and why the Consulate was not officially informed of the detention of two United States citizens until approximately 28 hours afterwards.[207]

188. U.S. federal policies and regulations also confirm that "without delay" requires immediate notification with respect to foreign nationals within the United States. For instance, a 1986 notice issued by the U.S. Department of State to law enforcement agencies nationwide regarding the Vienna Convention and the arrest of foreign nationals reads in pertinent part:

> The arresting official should in all cases *immediately* inform the foreign national of his right to have his government notified concerning the arrest/detention.
>
> If the foreign national asks that such notification be made, you should do so *without delay* by informing the nearest consulate or embassy.[208]

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[207] L. Lee, *Consular Law and Practice* (2d ed. 1991), at p. 149 (quoting U.S. Dep't of State, File No. P77 0095-2225; Dept. of State Digest, 1977, at 290).

[208] United States Department of State Notice, October, 1986 (emphasis added). Similarly, since 1967, Department of Justice regulations have provided that: "In every case in which a foreign national is arrested *the arresting officer shall inform the foreign national* that his consul will be advised of his arrest unless he does not wish such notification to be given." Notification of Consular Officers upon the arrest of foreign nationals, 28 C.F.R.§ 50.5 (1) (emphasis added). Likewise, since 1968, U.S. military regulations have stressed the need for immediate consular notification whenever a foreign national is arrested:

> When a circumstance requiring notification occurs, the *notifying officer will immediately communicate* by telegram directly with the consul of the foreign country concerned nearest the locale in which the circumstances requiring notification occur.

Consular Protection of Foreign Nationals Subject to the Uniform Code of Military Justice, AR 27-52, 5 November 1968 (emphasis added).

189. Certain state laws and regulations of the United States are even more specific. For instance, since 1999, all police officers in California have been required to provide immediate notification of consular rights:

> In accordance with federal law and the provisions of this section, every peace officer, *upon arrest and booking or detention for more than two hours* of a known or suspected foreign national, shall advise the foreign national that he or she has a right to communicate with an official from the consulate of his or her country....[209]

190. Finally, the United States has recently affirmed in federal court that *immediate* notification of consular rights is required under Article 36. During a recent oral argument before the U.S. Court of Appeals for the First Circuit, the following colloquy took place:

> The Court: Does it [the Vienna Convention] require that the individual be notified *immediately*?

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[209] Cal. Penal Code § 834c (a) (1) (1999). *See also* Georgia Department of Community Affairs, *A Model Law Enforcement Operations Manual*, chapter 8-1, *Sixth Edition*, Revised February 1996, *available at*: <http://www.dca.state.ga.us/research/law/Chap8-1.html> (last visited 10 June 2003). ("A foreign national who is arrested (taken into custody) will be informed that he or she has the right under a treaty to which the United States is a party, to have his or her country's embassy or nearest consulate notified of his or her arrest and detention. *This should be done at the time of the arrest* but no later than during booking at the jail.") (emphasis added).

Similarly, the New York Police Department requires the arresting officer to "[I]nform prisoner of right to have embassy or consulate notified" and requires the desk officer to "ensure that arresting officer" has carried out departmental procedures whenever "notification to the prisoner's embassy or consulate is required or in other cases when an arrested alien has so requested." *NYPD Patrol Manual*, Procedure No. 208-56 (Date Effective: 02-28-01).

Government Counsel: *Well, yes it does*. There is no question that this treaty was violated in this instance and the United States is not saying that it wasn't violated.[210]

b. Specifically, Without Delay Means Before Interrogation of the Foreign National.

191. The States party to the Convention obviously appreciated that under custodial circumstances, even a minor delay could cause irreparable prejudice to the rights of a foreign national. Without immediate notification and access, consular officers will be prohibited from performing their most basic functions to protect their most vulnerable nationals – those in the custody of a foreign state. Accordingly, Article 36 requires notification and access *without delay* to enable meaningful consular assistance.

192. As the U.S. Department of State advises its foreign service staff: "[p]rompt personal access . . . provides an opportunity for the consular officer to explain the legal and judicial procedures of the host government and the detainee's rights under that government *at a time when such information is most useful*."[211]

193. As discussed in Chapter Two, the most important aid a consular official can render comes at the outset of a criminal proceeding.

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[210] *United States v. Li*, 206 F.3d 56, 69 (1st Cir. 2000) (Torruella, C.J., dissenting) (emphasis added).

[211] U.S. Dep't of State, 7 *Foreign Affairs Manual* § 412 (emphasis added), Annex 28. In a letter to the Chairman of the Texas Board of Pardons and Paroles, on 27 November 1998, Former Secretary of State Madeline Albright summarized the thrust of the United States's consular assistance program for its nationals detained abroad thus:

> We assist by attempting to ensure that [detainees] understand the foreign country's legal system and their legal options, by helping them obtain qualified legal representation, by communicating with their families if they wish, and by taking other steps to improve the prisoner's situation and in some cases, to influence the outcome of the proceedings.

Correspondence with M. Albright, , Annex 29.

The assistance of qualified legal counsel is crucially important from the first moment of detention,[212] as is a working understanding of the local legal system. [213] Consuls are entitled to provide assistance with both. Therefore, just as countries recognize that a detainee must have immediate access "without delay" to legal advice prior to making any statement to authorities,[214] it is equally manifest that consular notification

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[212] The Human Rights Committee has stated that "all persons who are arrested must have immediate access to counsel." *Concluding Observations of the HRC: Georgia*, U.N. Doc. CCPR/C/79/Add.74, 9 April 1997, para. 28. The Inter-American Commission has stated that the right to defend oneself requires that an accused person be permitted to obtain legal assistance when first detained. *Annual Report of the Inter-American Commission, 1985-1986*, OEA/Ser.L/V/II.68, doc. 8 rev. 1, 1986, p. 154, El Salvador. *See also Murray v. United Kingdom*, (41/1994/488/570), 8 February 1996. paras. 40-70 (failure to grant access to counsel during the first 48 hours after his arrest was a violation of Article 6 of the European Convention on Human Rights).

[213] For this reason, "[a]ny person shall, *at the moment of arrest and at the commencement of detention* or imprisonment, or promptly thereafter, be provided by the authority responsible for his arrest, detention or imprisonment, respectively, *with information on and an explanation of his rights* and how to avail himself of such rights." Principle 13, *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, G.A. res. 43/173, annex, 43 U.N. GAOR Supp. (No. 49) at 298, U.N. Doc. A/43/49 (1988) (emphasis added).

[214] Many national constitutions require all detained persons to have access to counsel and advice about their legal rights "without delay." For example, Section 23(1)(b) of the New Zealand Bill of Rights Act (1990) states that every detained or arrested person "shall have the right to consult and instruct a lawyer *without delay* and to be informed of that right." Similarly, Section 10 (b) of the Canadian Charter of Rights and Freedoms (1982) declares that everyone has the right on arrest or detention "to retain and instruct counsel *without delay* and to be informed of that right" (emphasis added).

In construing the precise meaning of "without delay" in this context, the Supreme Court of Canada has explained that:

> A detainee is advised of the right to retain and instruct counsel without delay because it is *upon arrest or detention* that a detainee is faced with an *immediate* need for legal advice, *especially in respect of how to exercise the right to remain silent.*

and access must occur immediately upon detention and prior to any interrogation of the foreign detainee, so that the consul may offer useful advice about the foreign legal system and provide assistance in obtaining counsel before the foreign national makes any ill-informed decisions or the State takes any action potentially prejudicial to his rights.[215]

194. Accordingly, in *The Right to Information on Consular Assistance in the Framework of the Guarantees of Due Process of Law*,[216] the Inter-American Court of Human Rights concluded that

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R. v. Brydges, [1990] 1 S.C.R. 190, at p. 191 (emphasis added).

The Court of Appeal for Western Samoa reached precisely the same construction of the term "without delay" in that country's Constitution:

> Although there was no express requirement to inform the arrested person promptly of the right to consult counsel, this obligation was to be implied into Art 6(3) of the Constitution which provided inter alia that every person who is arrested shall be allowed to consult a legal practitioner of his own choice *without delay*... If the right to counsel was to be effective, the information had to be conveyed *before any statement was taken* and it should be made clear that if the person arrested wished to consult a lawyer, any questioning would be *deferred for a reasonable time* to enable the person to obtain legal advice.

Attorney-General v U, Western Samoa, Court of Appeal, 5 May 1994 1 HRNZ 286; [1996] 1 CHRLD 96 (emphasis added).

[215] As one English judge noted in the case of two Lebanese nationals, the notification obligation provides "a protection of fundamental importance." The court noted that had consular notification taken place,

> a French or Arabic speaking official would have visited the defendants in the police station at short notice. Such a person would have helped them to reach an informed decision about their position, and might well have advised them to obtain the services of a solicitor and an interpreter *before being interviewed*.

R. v. Bassil and Mouffareg (1990) 28 July, Acton Crown Court, HHJ Sich. Reported in *Legal Action* 23, December 1990 (emphasis added).

[216] Advisory Opinion OC-16/99 of 1 October 1999, Series A, No. 16.

because the Vienna Convention's drafters intended Article 36(1), among other goals, to ensure the efficacy of a foreign national's legal defense, "notification must be made at the time the accused is deprived of his freedom, or *at least before he makes his first statement before the authorities.*"[217]

195. The Inter-American Commission also concluded that consular notification "after crucial preliminary stages of [a foreign] national's criminal proceedings [have] transpired, including the retaining of his attorney, the presentation of the charges against him and the development of his defense" would fail to satisfy the mandate of "without delay."[218]

196. Irrespective of self-serving arguments formulated exclusively for the purpose of litigating the Vienna Convention before this Court in *LaGrand,*[219] with respect to U.S. nationals detained abroad, the United States has always understood the purpose of the consular notification right and the necessity of notification prior to interrogation and other prejudicial acts by the receiving state.

197. Certainly, the view adopted for purposes of the *LaGrand* litigation cannot be reconciled with the views previously expressed by the United States. The U.S. Department of State has acknowledged the functional definition of "without delay" meaning prior to interrogation, stating:

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[217] *Id.*, para. 106 (emphasis added).

[218] *See* Inter-American Commission on Human Rights Report No. 52/02, Merits, Case 11.753, (*Ramón Martinez Villareal v. United States*) (10 October 2002).

[219] *LaGrand*, Memorial of the United States of America, para. 84:

> ...nothing in Article 36 relates [a State's] notification obligations to the criminal justice process. Article 36 provides that both notification obligations must be carried out 'without delay,' but does not define this term or relate it to any particular event in the criminal justice process. Nor does Article 36 specify the *manner* in which consular officers must be notified, leaving it open to States party [to the Convention] to use a variety of methods, including ones that result in notification occurring after critical events in a criminal investigation have occurred.

> While there is no precise definition of "without delay," it is the Department's view that such notification should take place as quickly as possible and, in any event, no later than the passage of a few days. Serious problems in this regard have been experienced by American consular officers in countries in Eastern Europe, where . . . detention of an individual for prolonged "interrogation" prior to the filing of formal charges is officially sanctioned. . . . Clearly this type of procedure is not in keeping with either the letter or the spirit of the Vienna Convention.[220]

198. Similarly, in Congressional hearings in 1975 regarding American citizens in prison in Mexico, the administration of security and consular affairs for the Department of State testified:

> We believe that immediate consular access is the linchpin on which hangs in large measure the solution of many of our problems. With early access to each prisoner we are convinced we can go a long way toward guaranteeing the prisoner against mistreatment and forced statements at the time of arrest, along with making available to him information about responsible legal counsel and judicial procedures.[221]

199. Moreover, the United States responds vigorously when its nationals have faced interrogation without the benefit of consular assistance. On 29 August 2001, the United States Embassy in Belarus issued a formal statement on the case of Robert Fielding. Noting that Mr. Fielding had been arrested and subjected to a 10-hour interrogation and then subsequently deported, the Embassy stated:

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[220] U.S. Dep't of State File L/M/SCA, 1973 Dep't of State Digest 161, *quoted in* Lee, *supra*, at pp. 143- 144.

[221] U.S. Citizens Imprisoned in Mexico: Hearings before the Subcommittee on International Political and Military Affairs of the House Committee on International Relations, 94th Cong., 1st Sess. Part II, at 6 (1975). (*Statement of Hon. Leonard F. Walentrynoucz, Bureau of Security and Consular Affairs, Department of State*). U.S. Citizens Imprisoned in Mexico: Hearings before the Subcommittee on International Political and Military Affairs of the House Committee on International Relations, 94th Cong., 1st Sess. Part II, at 37 (1975) (*Letter from Hon. Robert J. McCloskey, Assistant Secretary of State for Congressional Relations to Hon. Dante B. Fascell, Dated November 26, 1975*).

> During this entire interrogation process, he was denied the right to legal counsel, forced to sign a statement, and subjected to being filmed by the state-controlled Belarusian National ... The U.S. Embassy would like to emphasize the following: The Government of Belarus is a signatory to the Vienna Convention on Consular Relations which assures notification, without delay, of home-country consular officers in cases where a foreign national is detained. The Government of Belarus acted with extraordinary haste to see that Mr. Fielding was deported before he could see a U.S. consular officer... By taking the extraordinary action of detaining and harassing an American citizen apparently for the sole purpose of creating a propaganda piece for the state-controlled Belarusian National Television, the Government has raised serious questions about its intentions.[222]

c. The Vulnerability of Foreign Nationals in Custody Requires the Definition that Mexico Urges.

200. The necessity of construing "without delay" to mean prior to interrogation of a detained foreign national is reinforced by the vulnerability of foreign nationals in custody.

201. Reports and documentation repeatedly show that the greatest potential for abuse by authorities exists at the time of initial custody and detention.[223] Indeed, in the landmark decision *Miranda v. Arizona*,[224] the

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[222] *Embassy Statement on Detention and Deportation of U.S. Citizen Robert Fielding*, Embassy of the United States of America, Minsk, Belarus, *available at* < http://www.usis.minsk.by/html/fielding.html> (last visited 10 June 2003).

[223] *See, e.g.*, Amnesty International, Torture Worldwide: An Affront to Human Dignity 12-13 (2000) (Criminal suspects are one of the most common victims of torture used to obtain information or extract confessions); *Civil and Political Rights, Including the Questions of Torture and Detention: Report of the Special Rapporteur, Sir Nigel Rodley*, U.N. Commission on Human Rights, 56th Sess., Provisional Agenda Item 11(a), ¶ 11, U.N. Doc E/CN.4/2000/9/Add.3 (2000) (Criminal suspects are most at risk of being subjected to torture or other ill-treatment in early phases of detention); N. S. Rodley, The Treatment of Prisoners Under International Law10-11 (2nd ed. 1999) (torture frequently used on ordinary criminal suspects immediately after being seized in order to secure confessions and other information); D. Lohman, Human Rights Watch, Confessions at any Cost: Police Torture in Russia (1999) (torture of detained

United States Supreme Court cited a police manual that illustrates the dangers inherent in custodial interrogation. The manual explained how best to elicit confessions, emphasizing how the conditions of custodial interrogation are conducive to the solicitation of confessions:

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persons is reportedly rampant in Russia); Amnesty International, United States of America: Police Brutality and Excessive Force in the New York City Police Department 9-10 (1996) (persons reportedly tortured by New York City police officers during course of arrest, during disputes, or in transport to station). Reports of Sir Nigel Rodley, Special Rapporteur to the [Torture Convention Committee] detail specific instances of police brutality during pre-trial custody in order to obtain confessions. *See, e.g.*, *Civil and Political Rights, Including the Questions of Torture and Detention: Report of the Special Rapporteur, Sir Nigel Rodley*, U.N. Commission on Human Rights, 57th Sess., Provisional Agenda Item 11(a), ¶ 6-9, 22, 114 U.N. Doc E/CN.4/2001/66/Add.1 (2001) (describing pre-trial custodial torture in order to extract confessions by law enforcement officials in Azerbaijan,); *Civil and Political Rights, Including the Questions of Torture and Detention: Report of the Special Rapporteur, Sir Nigel Rodley*, U.N. Commission on Human Rights, 57th Sess., Provisional Agenda Item 11(a), ¶¶ 7-9, 17, 56, U.N. Doc E/CN.4/2001/66/Add.2 (2001) (custodial torture by police reportedly endemic in Brazil); *Civil and Political Rights, Including the Questions of Torture and Detention: Report of the Special Rapporteur, Sir Nigel Rodley*, U.N. Commission on Human Rights, 56th Sess., Provisional Agenda Item 11(a), ¶ 5, U.N. Doc E/CN.4/2000/9/Add.2 (2000) (describing custodial torture in Cameroon to extract confessions or to punish or intimidate individuals suspected of having committed crimes); *Civil and Political Rights, Including the Questions of Torture and Detention: Report of the Special Rapporteur, Sir Nigel Rodley*, U.N. Commission on Human Rights, 56th Sess., Provisional Agenda Item 11(a), ¶ 6, U.N. Doc E/CN.4/2000/9/Add.3 (2000) (describing custodial torture by police in Romania to extract confessions or to punish criminal suspects); *Civil and Political Rights, Including the Questions of Torture and Detention: Report of the Special Rapporteur, Sir Nigel Rodley*, U.N. Commission on Human Rights, 56th Sess., Provisional Agenda Item 11, ¶¶ 6, 11, U.N. Doc E/CN.4/2000/9/Add.4 (2000) (describing torture used almost systematically to obtain confessions in Kenya); *Civil and Political Rights, Including the Questions of Torture and Detention: Report of the Special Rapporteur, Sir Nigel Rodley*, U.N. Commission on Human Rights, 55th Sess., Provisional Agenda Item 11(a), ¶ 14, U.N. Doc E/CN.4/1999/61/Add.1 (1999) (security forces carrying out interrogations in Turkey avoid visible signs of torture by using less brutal forms of torture).

[224] 384 U.S. 436 (1966).

> If at all practicable, the interrogation should take place in the investigator's office or at least in a room of his own choice. The subject should be deprived of every psychological advantage. In his own home he may be confident, indignant, or recalcitrant. He is more keenly aware of his rights and more reluctant to tell of his indiscretions of criminal behavior within the walls of his home. Moreover his family and other friends are nearby, their presence lending moral support.[225]

202. These facts apply *a fortiori* to foreign nationals who, far more than citizens detained by their own government, will find themselves, "thrust into an unfamiliar atmosphere and run through menacing police interrogation procedures."[226]

203. In the words of the United States: "Immediate consular access, in [the Department of State's] opinion, still remains the restraining factor preventing abusing treatment [in prison], and we continue to pursue that goal[.]"[227]

204. In sum, there can be no dispute that none of the objectives of Article 36(1)(b) can be achieved with appropriate effect (*effet utile*) unless compliance takes place literally "without delay," in other words, immediately and prior to any interrogation. It is also evident that the

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[225] *Id.* at 449-50 (quoting Inbau & Reid, *Criminal Interrogation and Confessions* (1962), p. 1 (internal quotation marks omitted); *see also id.* at pp. 448-56 (canvassing the range of interrogation techniques used by police officers to elicit confessions).

[226] *Id.* at 457. The U.S. Supreme Court further observed that foreign law had likewise recognized the dangers of custodial interrogation. *See id.* at 487-89 (discussing the law and practice of Scotland, England, and Ceylon).

[227] U.S. Citizens Imprisoned in Mexico: Hearings before the Subcommittee on International Political and Military Affairs of the House Committee on International Relations, 94th Cong., 1st Sess., Part II, at 58 (1975) (*Statement of Hon. Leonard F. Walentynowicz, Administrator, Bureau of Security and Consular Affairs, Department of State*); *see also id at 37* (*Letter from Robert J. McClosky, Asst. Sec. Of State for Congressional Relations to Hon. Dante B. Rascell, dated Nov. 26, 1975)* ("prompt consular access offers the best hope of effective deterrence of abuse during interrogation.").

United States routinely applies these same principles on behalf of its nationals detained abroad.

2. The United States Did Not Provide the Requisite Notice Without Delay To Any of the Fifty-Four Mexican Nationals.

205. The record in this case clearly establishes that the United States provided no notice whatsoever to fifty-one Mexican nationals who were convicted and sentenced to death in the United States. The United States – through the relevant municipal prosecuting authorities or through judicial findings – has conceded many of these violations; the others cannot be disputed.[228]

206. The record in this case also clearly establishes that even in the three cases where the United States did notify the detained Mexican nationals of their rights under Article 36, such notice either was not conveyed "without delay," or failed to notify the detained national of all his rights, as required by the plain language of Article 36(1)(b).[229]

207. Failure to provide the notice required by Article 36(1)(b) constitutes a violation of the "individual rights" of each detained foreign national, as established by this Court in *LaGrand*.[230] In fact, the failure to notify a national of his rights — and thereafter to notify that national's consulate upon request — without delay, eviscerates the entire purpose of Article 36(1). If a receiving State fails to comply with its obligations under Article 36(1)(b), a foreign national seldom will be aware of or in a position to exercise his right to contact his consular officer.

208. Equally, by failing to notify the detained Mexican nationals of their Article 36 rights, the United States necessarily also violated Mexico's right to provide consular assistance pursuant to subparagraphs (a) and (c). As this Court held in *LaGrand*, "when the sending State is unaware of the detention of its nationals due to the failure of the

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[228] *See supra* Chapter III.3.B.

[229] *See supra* Chapter III.3.B.

[230] *LaGrand*, para. 77.

receiving State to provide the requisite consular notification without delay, . . . the sending State has been prevented for all practical purposes from exercising its rights under Article 36, paragraph 1.'[231]

B. BY APPLYING ITS MUNICIPAL LAW IN A MANNER THAT FAILS TO GIVE FULL EFFECT TO THE PURPOSE OF ARTICLE 36, THE UNITED STATES HAS VIOLATED, AND CONTINUES TO VIOLATE, ARTICLE 36(2) OF THE VIENNA CONVENTION.

209. The United States violated Article 36(2) by invoking municipal laws to preclude judicial remedies for violations of Article 36(1). In particular, the United States has used its municipal default doctrines and its judicial findings that Article 36 does not create fundamental individual rights to bar Mexican nationals from challenging their convictions and death sentences on the basis that they were not notified pursuant to Article 36(2) of their right to contact their consulates.

210. Moreover, the United States has informed Mexico and this Court that because U.S. courts are barred by these municipal doctrines from considering Vienna Convention violations, it "has elected to rely on the clemency process in the specific cases that have arisen since *LaGrand* . . . [as] the surest and most effective way to take account of the violation of the Vienna Convention rights."[232] But, the discretionary clemency process – which rarely, if ever, includes a review and reconsideration of the effect of a violation of the Vienna Convention – cannot remedy the United States's failure to give full effect to the purposes of Article 36.

211. The United States's elevation of its municipal law and federalist structure over its treaty obligation to give "full effect" to the purposes of Article 36 is a violation of international law and constitutes a separate breach of its obligations under the Vienna Convention.

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[231] *LaGrand*, para. 74.

[232] CR 2003/4 (Collins), at p.16.

1. The United States Was Obligated to Give Full Effect to the Purposes of Article 36 in its Municipal Law To Enable the Effective Enforcement and Meaningful Vindication at Law of Those Consular Rights.

212. The drafters of the Vienna Convention envisioned "an international convention on consular relations, privileges and immunities [that] would . . . contribute to the development of friendly relations among nations, *irrespective of their differing constitutional and social systems.*"[233]

213. It was an essential task for the drafters to accommodate the myriad legal systems among the States party to the Convention, while at the same time protecting against States using their municipal laws to undermine the rights established in Article 36. To permit a State's laws and regulations to impair or diminish rights conferred by the Convention would defeat the object and purpose of Article 36(2) and violate the fundamental principle of international law that no state may invoke its municipal law or internal structure to excuse or justify failure to obey international law.[234]

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[233] *Id.*, pmbl. (emphasis added).

[234] *See, e.g., Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports* 1949, at p. 180 (emphasizing that where a "claim is based on the breach of an international obligation on the part of [a] Member [State], the Member [State] cannot contend that this obligation is governed by municipal law"); *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory, Advisory Opinion, 1932 P.C.I.J., Series A/B, No. 44*, p. 4 ("[A] State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force."); *Free Zones of Upper Savoy and the District of Gex, Order of 6 December 1930, P.C.I.J., Series A, No. 24*, p. 12 (observing that a State "cannot rely on [its] own legislation to limit the scope of [its] international obligations"). *See also* International Law Commission, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, Art. 3, ("The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law"); *Oppenheim's International Law*, pp. 500-01. International Law Commission, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, Art. 4 ("The

214. In order to strike that balance, Article 36(2) of the Vienna Convention provides:

> The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.[235]

215. The *travaux préparatoires* for the Vienna Convention, in particular the revision of the text of Article 36(2), clearly reveal the understanding of the States party of the meaning of "full effect." The ILC's Draft Articles on Consular Relations, which served as the basis for negotiations of the final text of the Convention, had provided in full:

> The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations *must not nullify* these rights.[236]

216. The United Kingdom proposed an amendment to this provision, which was ultimately accepted as the final text of Article

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conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State"); *see also* Vienna Convention on the Law of Treaties, 23 May 1963, art. 27, 1155 U.N.T.S. 331. ("A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty").

[235] Vienna Convention, art. 36(2).

[236] *Draft Articles on Responsibility of States for intentionally wrongful acts*, adopted by the International Law Commission at its Fifty-third session (2001), Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10 (A/56/10), Chp. IV.E.1, art. 36(2), (emphasis supplied) [hereafter "ILC Draft Articles"].

36(2), precisely because the ILC version did not, in its view, *go far enough*.[237]

217. The United Kingdom's delegate emphasized that "'to nullify' mean[s] to 'render completely inoperative.' But [the] rights [established by Article 36(1)] could be seriously impaired without becoming completely inoperative."[238] For example, while a sending State's "consulates must comply with laws and regulations on such matters as prison visiting and what might be given to the prisoner," "it was of the greatest importance . . . that the *substance* of the rights and obligations in paragraph 1 . . . be preserved."[239] Other State delegates agreed. Not only should municipal laws and regulations not "nullify" the rights in Article 36(1), they should not in any way impair the efficacy of those rights.

218. The Soviet delegation, supported by the Byelorussian and Romanian delegates, sought to resurrect the ILC version because it "recognized that national jurisdiction should not be interfered with, and ... established a satisfactory balance between the consul's right to protect his nationals and the requirements of municipal law in the receiving State."[240] As the Soviet delegate further pointed out, the approved version of Article 36(2) "could have serious consequences for the receiving State where an alien committed a crime."[241] The Soviet bloc feared the U.K. amendment could require changes in domestic criminal

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[237] *Official Records*, Proposals and Amendments Submitted to the Second Committee, at 85, United Kingdom: Amendments to Article 36, 13 March 1963, A/CONF.25/C.2/L.107.

[238] *Official Records*, Vol. I, p. 40 (statement of the United Kingdom).

[239] *Official Records*, Vol. I, p. 347 (statement of the United Kingdom).

[240] United Nations, Official Records of the Conference on Consular Relations, Vol. I, Twelfth Plenary Meeting, agenda item 10, para. 3, document A/CONF.25/16; see also id. para. 8 and Eleventh Plenary Meeting, agenda item 10, para. 26.

[241] *Id*, para. 4.

laws and procedures. After the consideration of these concerns, the U.K. amendment to Article 36(2) prevailed.[242]

219. Thus, the language of Article 36(2) maximizes the flexibility that each State enjoys to integrate those rights and obligations into its particular system of municipal law. But in no event can that flexibility become a pretext for diminishing or impairing the rights conferred by Article 36(1); in no event can the means chosen (*how* a State elects to give full effect) eviscerate the end required (that its laws and regulations *do in fact* give full effect).

220. In *LaGrand*, the Court had occasion to interpret the requirements of the obligation established by Article 36(2) to give "full effect to the purposes" for which Article 36 was intended. With respect to German nationals who were "convicted and sentenced to severe penalties" without having been afforded their rights to consular notification and communication, the Court held, *first*, that a State violates Article 36(2) when it gives effect to a law or regulation that

> does not allow [a detained foreign national of the sending State] to challenge a conviction and sentence by claiming, in reliance on Article 36, paragraph 1, of the Convention, that the competent national authorities failed to comply with their obligation to provide the requisite consular information "without delay," thus preventing the person from seeking and obtaining consular assistance from the sending State.[243]

221. *Second*, the Court held that a receiving State violates Article 36 when it gives effect to a law or regulation that prevents the authorities of

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[242] *Official Records*, Vol. I, p. 348.

[243] *LaGrand, Judgment of 27 June 2001*, para. 90; *cf.* Vienna Convention on Consular Relations *(Paraguay v. United States of America), I.C.J. Reports 1998, Order of 9 April*, Declaration of President Schwebel ("It is of obvious importance to the maintenance and development of a rule of law among States that the obligations imposed by treaties be complied with and that, where they are not, reparation be required.").

that State "from attaching any significance to the fact [of] the violation."[244]

222. *Third*, in the case of such a conviction and sentence, the Court imposed an obligation on the United States "to allow the review and reconsideration" of both the conviction and the sentence where rights to consular access were violated.[245] The Court specifically instructed the United States that the review and reconsideration had to "tak[e] account of the violation of the rights set forth in the Convention."[246]

223. *Finally*, by holding that the United States had the "choice of means," the Court left the implementation of these concrete obligations to the United States.

224. In *LaGrand*, the Court considered Article 36(2) in the context of the United States municipal-law doctrine of procedural default. As discussed in Chapter Two, pursuant to that doctrine, a defendant who could have raised, but fails to raise, a legal issue at trial will generally not be permitted to raise it in future proceedings, on appeal or in a petition for a writ of *habeas corpus*. Because application of the procedural default doctrine *(i)* prevented the LaGrand brothers (nationals of the sending State) from challenging their convictions and sentences in reliance on Article 36(1), and *(ii)* prevented the courts (authorities of the receiving State) from attaching significance to the fact of the violations, the Court held that the United States had "breached its obligation" to Germany and the LaGrand brothers (German nationals) "under Article 36, paragraph 2, of the Convention."[247] The Court thereby affirmed its authority to hold, "[i]f necessary, that a domestic law has been the cause of th[e] violation."[248]

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[244] *Id.*, para. 91.

[245] *Id.*, para. 125.

[246] *Id.*, paras. 125, 128(7).

[247] *Id.*, para. 128(4).

[248] *Id.*, para. 125.

225. Although the *LaGrand* judgment is binding only between the United States and Germany, the Court's holding with respect to the "obligations of the United States in cases of severe penalties imposed on German nationals" who were not accorded their rights under Article 36 has clear relevance for Mexico, as well. In a separate declaration President Guillaume stated:

> subparagraph (7) [of the dispositif] does not address the position of nationals of other countries or that of individuals sentenced to penalties that are not of a severe nature. However, in order to avoid any ambiguity, it should be made clear that there can be no question of applying an *a contrario* interpretation to this paragraph.[249]

2. The United States Has Violated Article 36(2) by Foreclosing Legal Challenges to Convictions and Death Sentences of Mexican Nationals Resulting from Proceedings That Failed to Respect Article 36(1) of the Convention.

226. By applying provisions of its municipal law to defeat or foreclose remedies for the violation of rights conferred by Article 36 – thus failing to provide meaningful review and reconsideration of severe sentences imposed in proceedings that violated Article 36 – the United States has violated, and continues to violate, the Vienna Convention.

227. The United States uses several municipal legal doctrines to prevent finding any legal effect from the violations of Article 36. *First*, despite this Court's clear analysis in *LaGrand,* U.S. courts, at both the state and federal level, continue to invoke default doctrines to bar any review of Article 36 violations – even when the national had been unaware of his rights to consular notification and communication and thus his ability to raise their violation as an issue at trial, due to the competent authorities' failure to comply with Article 36.

228. In the case of Ramiro Ibarra Rubí,[250] although state officials conceded both "that he is a citizen of Mexico and that he was never

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[249] *Id.*, Decl. Guillaume.

[250] Case no. 34 in Mexico's Application.

informed of or accorded his right to free access to and consultation with the consular post of Mexico,"[251] the Texas Court of Criminal Appeals applied the state procedural default doctrine and refused to consider Mr. Ibarra's claim that the detaining authorities had failed to notify him of his rights under Article 36 of the Vienna Convention:

> We need not decide the merits of appellant's contention, however, as he failed to preserve this issue for review. [Texas] Rule of Appellate Procedure 33.1, Preservation of Appellate Complaints, requires that the record show the complaint was timely made to the trial court, the grounds were specifically stated or were readily apparent, the complaint complied with the rules of evidence or appellate procedure, and the requirement of a ruling on the complaint be satisfied. Except for complaints involving fundamental constitutional systemic requirements, which are not applicable here, all other complaints based on a violation of both constitutional and statutory rights are waived by failure to comply with Rule 33.1.[252]

229. The court made no exception for the fact that Article 36 violations consist of a failure of the authorities to notify defendants of their rights.

230. As this Court is aware, the federal procedural default rule works in a similar fashion. Once a state court determines a Mexican national's Article 36 claim to have been defaulted because it was not raised at the trial level, the federal courts reviewing cases from these states will defer to that default finding and will therefore refuse to consider the merits of the underlying claim. [253]

231. The federal procedural default rule is subject to several limited exceptions; however, the application of these exceptions reveals the

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[251] *Ibarra v. State*, 11 S. W .3d 189, 197 (Tex. Crim. App. 1999).

[252] *Id. (internal citations omitted).*

[253] *See, e.g., Murphy v. Netherland*, 116 F.3d 97, 100 (4th Cir. 1997); Annexes 39-65 (containing court decisions in the cases of Mexican nationals which apply the procedural default rule).

extent to which the United States misconceives of the importance of the rights created by Article 36 and fails to give them full effect. An inmate seeking a federal writ of *habeas corpus* can overcome a state procedural default if he can demonstrate "cause for the default and prejudice attributable thereto, or demonstrate that failure to consider the federal claim will result in a fundamental miscarriage of justice."[254] "Cause" sufficient to excuse a state procedural default requires the inmate to prove "that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule."[255] 'Prejudice' means proof "not merely that the errors at his trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions."[256] And 'miscarriage of justice' means "the conviction of one who is actually innocent."[257]

232. Federal courts have held that Vienna Convention claims do not satisfy any of these exceptions.[258] Just as the Texas Court of Criminal Appeals refused to make an exception for state procedural default rules for Mr. Ibarra's claim because it did not consider Article 36 a "fundamental constitutional systemic requirement," so too no court has ever found, and no prosecutor has ever agreed, that failure to consider a defaulted Vienna Convention claim would cause "prejudice" or would work a "miscarriage of justice."

233. Likewise, federal courts have specifically "rejected [the] contention that the novelty of a Vienna Convention claim and the state's failure to advise the [foreign national] of his rights under the Vienna

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[254] *Harris v. Reed*, 489 U.S. 255, 262 (1989)(*internal citations omitted*), *emphasis added.*

[255] *Murray v. Carrier*, 477 U.S. 478, 488 (1986).

[256] *United States v. Frady*, 456 U.S. 152, 170 (1982).

[257] *Carrier*, 477 U.S. at 496.

[258] *See, e.g., LaGrand v. Stewart*, 133 F.3d 1253, 1261 (9th Cir. 1998) ("It is undisputed that the State of Arizona did not notify the LaGrands of their rights under the [Vienna Convention]. It is also undisputed that this claim was not raised in any state proceeding. The claim is thus procedurally defaulted.").

Convention could constitute cause for the failure to raise the claim in state court."[259] Courts find that [t]he legal basis for the Vienna Convention claim could ... have been discovered upon a reasonably diligent investigation by [the defendant's] attorney."[260]

234. By contrast, despite the fact that "the Vienna Convention has been in effect since 1969,"[261] federal courts also consider Vienna Convention claims to raise such new rules of criminal procedure so as to bar Vienna Convention claims pursuant to the non-retroactivity doctrine of *Teague v. Lane*.[262] Under *Teague*, the federal courts refuse to grant *habeas* relief based on a rule that "breaks new ground or imposes a new obligation on the States or the Federal Government."[263]

235. So, in short, U.S. courts consider a claim under Article 36 to be sufficiently new both to excuse an incompetent attorney and to trigger the non-retroactivity doctrine of *Teague* so as to bar relief for Mexican nationals whose rights *to be notified of the basis for such a claim* were violated, but not sufficiently novel to constitute justifiable cause for failing to timely raise them in trial proceedings.

236. *Second*, even where the Vienna Convention claims of Mexican nationals have not been defaulted, U.S. courts refuse to provide judicial remedies, because they have determined that the Vienna Convention does not create individual rights, or that it does not create fundamental due process rights on a par with constitutional rights (*e.g.*, the right to

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[259] *Breard v. Pruett*, 134 F.3d 615, 619-620 (4th Cir. 1998); *see also Murphy v. Netherland*, 116 F.3d 97, 100 (4th Cir. 1997) (same).

[260] *Id.* Ironically, while finding Vienna Convention claims insufficiently "novel" to excuse raising the claims below, courts refuse to grant *habeas* claims of ineffective assistance of counsel where inept trial counsel failed to raise such claims on the ground that Vienna Convention claims arose relatively recently and even competent counsel cannot be expected to have foreseen such a development in the law.

[261] *Breard v. Pruett*, 134 F.3d 615, 620 (4th Cir. 1998).

[262] *See supra* Chapter III.C.1.

[263] *Teague v. Lane*, 489 U.S. 288 (1989).

counsel), or that, in any event, Mexican nationals are not entitled to a remedy without meeting a high threshold of proof that they have been prejudiced by the United States's failure to abide by its obligations under Article 36.[264]

237. As a result of these various holdings declining to equate Article 36 rights with "fundamental rights," Mexican nationals generally cannot obtain any effective relief by asserting violations of the Vienna Convention.[265] For example, state courts have refused to extend to violations of Article 36 the constitutional rule of United States municipal law that excludes evidence obtained in violation of a defendant's rights under *Miranda v. Arizona*.

238. Just as the procedural default doctrine has "the effect of preventing 'full effect [from being] given to the purposes for which the rights accorded under [Article 36] are intended'" because it prevents foreign nationals from effectively challenging their convictions and sentences on the basis of Article 36 violations, so too the refusal to recognize Article 36 rights as fundamental to due process for a foreign national violates the mandate of Article 36(2) because it also prevents the courts "from attaching any legal significance" to the effect of such violations.[266]

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[264] *See supra* Chapter III.C.

[265] *See, e.g., State v. Chavez*, 19 P.2d 923, 925 (Or. 2001) (holding that the exclusionary rule does not apply to Vienna Convention violations); *Zavala v. State*, 739 N.E.2d 135, 138-43 (Ind. 2001) (same). Since *LaGrand*, federal courts addressing the issue have also continued to find that exclusion of evidence is entirely unavailable as a remedy for Article 36 violations. *See, e.g., United States v. Emuegbaum*, 268 F.3d 377, 390-91 (6th Cir. 2001), *cert. denied*, 122 S. Ct. 1450 (2002); *United States v. Felix-Felix*, 275 F.3d 627, 635 (7th Cir. 2001); *United States v. Carrillo*, 269 F.3d 761, 771 (7th Cir. 2001), *cert. denied*, 122 S.Ct. 1576 (2002); *United States v. Gamez*, 301 F.3d 1138, 1143-44 (9th Cir. 2002), *cert. denied* 2003 WL 21048997 (May 27, 2003); *United States v. Robinet*, No. 00-50495, 2001 WL 1631475, at *1 (9th Cir. 2001); *United States v. Contreras-Cortez*, No. 01-8030, 2002 WL 734772, at *2 (10th Cir. 2002); *United States v. Minjares Alvarez*, 264 F.3d 980 (10th Cir. 2001).

[266] *LaGrand*, para 91.

3. Clemency Review Does Not Give Full Effect To The Purpose Of Article 36 And Does Not Provide Uniform, Fair Or Meaningful "Review And Reconsideration."

239. At the hearing on provisional measures in this case, the United States for the first time explained to this Court its understanding of the obligation of "review and reconsideration." The United States argued that the Court's holding in *LaGrand* did not impose an obligation of result on the United States. Rather, "[t]he obligation imposed upon the United States under the Vienna Convention for a violation of the right of consular notification is an obligation of review and reconsideration, not an obligation of result."[267]

240. Moreover, the United States maintained that it alone had the choice of means in providing review and reconsideration. From this position the United States deduces that the Court "has already delineated what remedy is available under international law" and left it to the United States to implement the remedy.[268] It was thus "not appropriate for this Court" to review the means taken by the United States.[269]

241. The United States explained that, since it had the "choice of means," it had decided that "the clemency process" was "an appropriate means for ensuring review and reconsideration of convictions and sentences."[270] Counsel for the United States explained that:

> clemency has been one of the principal means by which the United States has sought to accomplish the review and reconsideration contemplated by this Court in *LaGrand*. It has elected to rely on the clemency process in the specific cases that have arisen since *LaGrand*. . . [The clemency process is] the

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[267] CR 2003/2 (Thessin), at 32, para. 3.46.

[268] *Id.*, at 33, para. 3.49.

[269] *Id.*

[270] CR 2003/2 (Brown), at 20, para. 3.10.

surest and most effective way to take account of the violation of the Vienna Convention rights.[271]

242. The United States openly admitted that it chose the remedy of clemency proceedings precisely because judicial proceedings may not always provide an adequate review and reconsideration of a conviction or sentence for a violation of the Vienna Convention. As the Agent for the United States put it plainly, "[a] court may determine . . . that domestic law principles still preclude an express judicial remedy for a failure of consular notification."[272] In short, the United States effectively conceded that its municipal laws do not presently permit "review and reconsideration" of convictions and death sentences by taking into account the violation of Article 36 rights of Mexican nationals. Hence, the United States maintains that "review and reconsideration through the clemency process occurs if it does not first occur in the judicial process."[273]

243. However, executive clemency does not fulfill the United States's obligation to give full effect to the purposes of Article 36, and the United States was and is not entitled to choose an ineffective remedy to satisfy its international legal obligations.

244. As an initial matter, the United States's reliance on clemency proceedings is wholly inconsistent with its obligation to provide a remedy, as that obligation was found by this Court in *LaGrand.*

245. *First*, it is clear that the Court's direction to the United States in *LaGrand* clearly contemplated that "review and reconsideration"

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[271] CR 2003/4 (Collins), at 16. *See also id.* at 25 (Taft) "We also have made a conscious choice to focus our efforts on clemency proceedings for providing the review and reconsideration this Court called for in *LaGrand* . . . clemency proceedings provide a more flexible process that is best suited for achieving, without procedural obstacles the review and reconsideration this Court called for".

[272] CR 2003/4 (Taft), at 25. And indeed this is an indisputable point. U.S. courts routinely and consistently refuse to provide judicial remedies for violations of Article 36. *See supra* Chapter III.C.

[273] CR 2003/2 (Brown), at 28, para. 3.34.

would be carried out by judicial procedures. The reference to "review and reconsideration" in the decision came in direct response to Germany's second submission: that the United States' application of the doctrine of procedural default barred Karl and Walter LaGrand from raising their Vienna Convention claims during appellate review. Procedural default is a purely judicial concept, with no bearing on clemency. The Court found that this denial of *judicial* review and reconsideration constituted a violation of the United States' obligation to give "full effect" to the rights enshrined under Article 36.[274]

246. *Second*, the Court was fully aware that the LaGrand brothers had received a clemency hearing, during which the Arizona Pardons Board took into account the violation of their consular rights.[275] Accordingly, the Court determined in *LaGrand* that clemency review alone did not constitute the required "review and reconsideration;" otherwise, the Court presumably would not have found that the United States violated its obligations to give "full effect" to the rights of the LaGrand brothers contained in Article 36.

247. *Finally,* the Court specified that the United States must "allow the review and reconsideration of the *conviction and sentence* by taking account of the violation of the rights set forth in the Convention."[276] As the United States is well aware, it is a basic matter of U.S. criminal procedural law that courts review convictions; clemency panels do not. With the rare exception of pardons based on actual innocence, the focus of capital clemency review is on the propriety of the sentence and not on the underlying conviction.[277]

248. Nevertheless, Mexico is compelled to address the United States' contentions that the clemency process is "an appropriate means" to review violations of Article 36.[278] As explained in detail below,

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[274] *See LaGrand, Judgment of 27 June 2001,* para. 128(4); paras. 90 and 91.

[275] *Id.*, paras. 27, 31.

[276] Id., para. 7 (emphasis added).

[277] *See Ohio Adult Parole Authority et al. v. Woodard*, 523 U.S. 284 (1998).

[278] CR 2003/02 (Brown), at 20, para. 3.10.

clemency review is standardless, secretive, and immune from judicial oversight.[279] Moreover, clemency procedures in most executing states within the United States are so grossly deficient that they could not possibly provide meaningful review or reliable reconsideration.[280]

249. Finally, the failure of state clemency authorities to pay heed to the interventions of the U.S. Department of State in cases of death-sentenced Mexican nationals refutes the contention that clemency review will provide meaningful consideration of the violations of rights conferred under Article 36.

a. The Nature of Clemency Review

250. By definition, clemency is an executive act of grace and not a matter of right.[281] The United States Supreme Court has repeatedly held that a prisoner has no constitutional entitlement to commutation of his sentence, and that clemency decisions are largely immune from judicial review.[282] "A petition for commutation, like an appeal for clemency, 'is simply a unilateral hope.'"[283]

> An examination of the function and significance of the discretionary clemency decision . . . readily shows it is far different from the first appeal of right. . . Clemency proceedings are not part of the trial – or even of the adjudicatory process. They do not determine the guilt or innocence of the defendant, and are not intended primarily to enhance the reliability of the trial process.[284]

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[279] *See generally* Declaration of Michael Radelet, Annex 1.

[280] *Id.*

[281] *Id.*

[282] *Id. See also Ohio Adult Parole Authority v. Woodard,* 523 U.S. 272 (1998); *Connecticut Bd. of Pardons v. Dumschat,* 452 U.S. 458, 464 (1981).

[283] *Ohio Adult Parole Authority et al. v. Woodard, supra,* at 280 (*citing Dumschat*, 452 U.S. at 465).

[284] *Id.* at 284.

251. As a Congressional subcommittee report concluded in 1993, "the prospect of clemency provides only the thinnest thread of hope and is certainly no guarantee against the execution of an innocent individual."[285]

252. It is widely recognized that clemency review in the United States is strongly influenced by political considerations, particularly in capital cases.[286] As one recent commentary states:

> Invariably, the clemency process involves an elected official and her or his appointees who regularly take into account the potential reaction of the news media, political allies and adversaries, special interest groups, as well as the implications for a future political career, whenever he or she makes a decision. The reality is perhaps best captured in the recent words of one governmental official: "if I told you that politics were irrelevant [to the clemency decision], that would be like the fish telling you the water doesn't matter."[287]

The risk that politics rather than the merits of the individual case will determine clemency outcomes is not limited to elected officials; appointed members of pardons boards are also implicated.[288]

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[285] Committee on the Judiciary, Subcommittee on Civil and Constitutional Rights, *Innocence and the Death Penalty: Assessing the Danger of Mistaken Executions*, page 18 (November 1994).

[286] *See, e.g.*, Declaration of Michael Radelet, Annex 1; J. Berry, *Governors Shy Away from Death Row Pardons*, Dallas Morning News, 15 August 1993, at 1J; C. Sullivan, Associated Press, BC Cycle, *Another Death Penalty Debate: Are Clemency Decisions Arbitrary?*, 27 June 1993; see also D. Kobil, *Chance and the Constitution in Capital Clemency Cases*, 28 Cap.U. L. Rev. 567, 567 (2000).

[287] B. Breslin & J.P Howley, *Defending the Politics of Clemency*, 81 Or. L. Rev. 231, 232 (2002).

[288] For example, H. Marsellus, former chairman of the Louisiana Board of Pardons and Paroles, has admitted that pressure from the Governor's office compelled him to vote against clemency in cases such as that of Timothy Baldwin, who Marsellus believed to be innocent. *See* H. Prejean, C.S.J., *Dead Man Walking*, (1993) pp. 169-74.

253. Due largely to the increased politicization of the death penalty itself, the use of clemency has declined precipitously in the last twenty-five years to the point where only a small fraction of those facing execution are now released from death row through executive action.[289] As the American Bar Association (ABA) has pointed out:

> In recent years, however, clemency has been granted in substantially fewer cases than it was prior to the U. S. Supreme Court's 1972 decision declaring the death penalty unconstitutional. . . In fact, the need for a meaningful clemency power is more important than ever.[290]

254. Each of the states in which Mexican nationals have been sentenced to death has instituted its own unique approach to executive clemency review.[291] In 14 states, the governor has sole authority for clemency review and decision-making. In 9 states, the governor may only commute a death sentence based on the favorable recommendation of a pardons board or other advisory body. In 9 other states, the governor makes a final decision after receiving a non-binding decision from an advisory body. In 3 states, the governor is a member of the clemency board, which makes a binding decision on a majority vote.

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[289] *See* M. A. G. Korengold et al., *And Justice For Few: The Collapse of the Capital Clemency System in the United States*, 20 Hamline L. Rev. 349 (1996).

[290] American Bar Association Section Of Individual Rights And Responsibilities, *Death without Justice: A Guide for Examining the Administration of the Death Penalty in the United States*, p. 23 (June, 2001). Available at <http://www.abanet.org/irr/pubs.html> (last visited 14 June 2003).

[291] Ariz. Const., Art. V, §5, Ariz. Rev. Stat. Ann. §§31-443, 31-445 (1996); Ark. Const., Art. VI, §18, Ark. Code Ann. §§5-4-607, 16-93-204 (1997, Supp. 1997); Cal. Const., Art. V, §8, Cal. Penal Code Ann. §§4800-4807 (West 1992); Fla. Const., Art. IV, §8, Fla. Stat. §940.01 (1997); Ill. Const., Art. V, §12, Ill. Comp. Stat., ch. 730, §5/3-3-13 (1997); Nev. Const., Art. V, §13, Nev. Rev. Stat. §213.100 (1995); Ohio Const., Art. III, §11, Ohio Rev. Code Ann. §§2967.01 to 2967.12 (1996); Okla. Const., Art. VI, §10, Okla. Stat., Tit. 21, §701.11a (Supp. 1998); Ore. Const., Art. V, §14, Ore. Rev. Stat. §§144.649 to 144.670 (2001); Tex. Const., Art. IV, §11, Tex. Crim. Proc. Code Ann., Art. 48.01 (Supp. 1997).

Finally, in 3 states, authority over clemency review and decisions rests solely with a pardons board which does not include the governor.[292]

255. Just as the mechanisms for executive clemency vary widely, so too do the actual procedures for reviewing petitions. Even states that rely on similar mechanisms have instituted widely differing review procedures. In some states, parole boards have the discretion to convene hearings on clemency petitions. Such clemency hearings are routinely held in Oklahoma and Arizona, whereas the Texas Board of Pardons and Paroles routinely fails to hold hearings and does not even meet as a body to discuss the petitions submitted to it.

256. In jurisdictions that rely entirely on clemency review by the state governor, such as California, no formal procedures exist for clemency hearings. As a consequence, governors must rely on their own private and subjective review of materials submitted by the prosecution and the defense, augmented by whatever interviews they may see fit to conduct. Identical claims for clemency may thus receive a full and open hearing in one jurisdiction and only cursory review when raised in an adjacent state.[293]

257. Governors and parole boards across the United States have virtually unfettered discretion to grant or deny commutation requests.[294] Although the general procedures for the consideration of clemency petitions are specified under state laws or regulations, few provisions exist to guide decision-makers on the criteria for exercising mercy. Clemency outcomes are thus entirely discretionary, subject only to the requirement in a handful of states that the executive authority must provide an explanation for its decision. The most common reasons for the 48 humanitarian commutations of death sentences between 1977 and 2002 were: doubt over the defendant's guilt (15 cases), disproportionate sentencing (10 cases), opposition to the death penalty in principle (9

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[292] Death Penalty Information Center, *Clemency*, available at <http://www.deathpenaltyinfo.org/Article.php?did=126&scid=13> (last visited 14 June 2003).

[293] *See* Declaration of Michael Radelet, Annex 1.

[294] *Id.*

cases) and mental incapacity (6 cases).[295] Due process concerns such as trial irregularities almost never result in humanitarian commutations; the assumption by many clemency authorities appears to be that such questions have already been addressed and disposed of by the appellate courts.[296]

258. The crisis in clemency review prompted the ABA to develop extensive criteria and recommendations to ensure the fairness of clemency proceedings nationwide.[297] To date, no state has adopted those recommendations.

259. Given the entirely discretionary nature of clemency review and the wide disparities in the procedures used, it is not surprising that the ratio of commutations to executions fluctuates wildly by jurisdiction. The following table displays the ratio between commutations of death sentences on humanitarian grounds and executions carried out, in each of the nine jurisdictions in which Mexican nationals are currently under sentence of death.

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[295] *See* M. L. Radelet & B. A. Zsembik; Executive Clemency in Post-Furman Capital Cases, 27 *University of Richmond Law Review* (1993), at p. 289 and the annual updates provided by the Death Penalty Information Center, Washington, D.C.

[296] For example, during his term as governor of Texas, George W. Bush reiterated that "the only two issues he considered appropriate for purposes of clemency were actual innocence and whether access to the courts had been provided." Amnesty International, Killing without Mercy: Clemency Procedures in Texas, p.8, AI Index: AMR/51/85/99. Available at <http://www.web.amnesty.org/library/index/ENGAMRS1085199?open&of=ENG-USA> (last visited 14 June 2003). *See generally* A.L. Williamson, *Clemency in Texas--A Question of Mercy?*, 6 Texas Wesleyan Law Review (1999), at p. 140.

[297] *Id.* at pp. 25-27.

Percentage ratio of commuted death sentences to executions, 1977-2003 (as of 26 February 2003)[298]

Jurisdiction	Executions	Humanitarian commutations	Percentage ratio
Texas	298	1	0.34%
Oklahoma	57	1	1.75%
Florida	55	6	10.91%[299]
Arkansas	24	1	4.17%
Arizona	22	0	0.00%
California	10	0	0.00%
Nevada	9	1	11.11%
Ohio	6	8	133.33%[300]
Oregon	2	0	0.00%
Average	54	2	3.70%

b. Clemency Proceedings Fail to Provide Necessary Procedural Safeguards.

260. As the U.N. Special Rapporteur on summary, arbitrary or extrajudicial executions has noted, "[p]ardon or commutation generally has limited fair procedure safeguards."[301] The United States has vigorously opposed the provision of federal funds to lawyers for death row inmates that would allow them to file clemency requests with state authorities.[302] As a result, indigent death row inmates in 12 states are no

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[298] *Death Penalty Information Center*, information available at: <http://www.deathpenaltyinfo.org/> (last visited 10 Jun 2003).

[299] No commutations have been granted in Florida since 1983.

[300] All 8 commutations were granted by an outgoing governor in 1991.

[301] UN Economic and Social Council, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, UN Doc. E/CN.4/1998/68/Add.3, para. 102, 22 January 1998.

[302] Brief for the United States as Amicus Curiae, *In re Gary A. Taylor*, No. 01-1605, November 2002.

longer entitled to receive federally funded legal representation to assist them in preparing clemency applications.[303] Consequently, many condemned prisoners will be executed without seeking clemency, simply because they cannot afford to retain a lawyer.[304]

261. The clemency process in Texas, where sixteen Mexican nationals are currently under sentence of death, has been harshly criticized for its lack of procedural fairness. In Texas, prisoners have no right to a hearing, no right to present witnesses, and no right to confront the witnesses against them. The UN Special Rapporteur "was appalled to find out that in Texas, the [pardons board] members never meet, do not discuss the cases brought to their attention together and provide their individual votes by phone."[305]

262. Indeed, the Texas Board of Pardons and Paroles has no substantive criteria to guide its members in deciding whether to spare an

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[303] *See Clark v. Johnson*, 278 F.3d 459, 462-63 (5th Cir.), *cert. denied (2002)*, 123 S.Ct. 687 (2002); *King v. Moore*, 312 F.3d 1365, 1368 (11th Cir.), *cert. denied*, 123 S.Ct. 662 (2002); *Hain v. Mullin*, 324 F. 3d 1146 (10th Cir. 2003). Collectively, these decisions are binding on 12 U.S. states which account for some 61% of all executions since 1977. The states (with numbers of executions as of April 3, 2003) are: Texas (301), Oklahoma (59) , Florida (54), Georgia (32), Louisiana (27), Alabama (26) Mississippi (6), Utah (6), Colorado (1), New Mexico(1), Wyoming (1), Kansas.

[304] For example, in the case of Emerson Rudd, the federal courts denied counsel's request for funding to present a clemency application on behalf of Mr. Rudd. The United States Supreme Court denied a stay of execution, and Mr. Rudd was executed without filing a clemency application. *Rudd v. Cockrell*, 122 S.Ct. 585 (2001). Of the twelve states cited above, only Florida provides by statute for state-funded representation of indigent prisoners in capital clemency proceedings. *See* Fla. Stat. Ann. §§ 27.702, 922.07, 925.035(4) (West 2001 & Supp. 2002).

[305] United Nations Economic and Social Council, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, supra*, para. 102, 22 January 1998. Not surprisingly, the board has never recommended pardon in a capital case.

inmate's life.[306] Board members are not required even to read clemency applications.[307] The Board has consistently refused to provide any notice of the factors it considers in weighing a prisoner's request for commutation of a death sentence.[308] Although the Board's regulations provide for clemency hearings, the Board has not convened a hearing for several years. At least 213 inmates have been executed without clemency hearings in the last eleven years.

263. After reviewing numerous Texas clemency petitions raising well-founded claims of actual innocence, mental retardation and other compelling issues, Amnesty International determined:

> Far from serving as the fail-safe mechanism envisaged by the US Supreme Court, the Texas Board Of Pardons And Paroles had become something akin to a hostile and secretive agency interested only in preserving the illusion of meaningful clemency review.[309]

264. The case of Canadian national Joseph Stanley Faulder illustrates the insurmountable obstacles facing foreign nationals seeking clemency review in Texas. Faulder's case involved an undisputed violation of Article 36, which prompted former Secretary of State Madeleine Albright to write a letter on his behalf to then-Governor George Bush and the Texas Board of Pardons and Paroles, suggesting that clemency might be an appropriate remedy for the treaty violation.[310]

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[306] *Faulder v. Texas Board of Pardons and Paroles, et. al.*, No. A-98-CA-801, at 111 (Testimony of Board Chairman Victor Rodriguez at Evidentiary Hearing on December 21-22, 1998), Annex 31.

[307] *Id.* at 66 (Testimony of Brett Hornsby, Supervis or of Texas Clemency Process for the Board of Pardons and Paroles) , Annex 31.

[308] *Id.* at 146-48 (Testimony of Victor Rodriguez) , Annex 31.

[309] Amnesty International, *Killing without Mercy: Clemency Procedures in Texas*, supra, page 5.

[310] *Id.*, at p. 5 (referring to Letter to Victor Rodriguez, Chairman, Texas Board of Pardons and Paroles, 27 November 1998). Excerpts of letter also available at <http://www.deathpenaltyinfo.org/Article.php?did =536&scid=45> (last visited 14 June 2003). Ms. Albright's letter, which contained eleven pages of

In her letter, she explained that Texas had violated Mr. Faulder's rights under the Vienna Convention on Consular Relations, described the impact of the violation on Mr. Faulder's trial, and offered to send State Department representatives to discuss the matter with the Board. By the time her letter reached the Board, however, all but four members of the Board had voted to deny Mr. Faulder's request for clemency.[311] The Board never responded to the Secretary's offer to meet with its members, nor did the Board poll its members who had already voted, to determine whether they wished to change their votes in light of the Secretary's observations.[312] The Board denied Faulder's request for commutation, and refused to grant him a hearing on his request.

265. Faulder sued, arguing that the Board's secretive clemency procedures had violated his right to due process. In December 1998, a federal district court in Austin, Texas convened a hearing in the case. Testimony elicited at the hearing established that none of the 17 board members had discussed Secretary Albright's letter. None of the several board members who testified could remember the contents of the letter, which they had received one month earlier. Board member Paul Prejean's testimony typifies the quality of the Board's review of the Article 36 violation:

> Q: . . . What did you think of Secretary of State Albright's letter?
>
> A: Well, the letter pretty much explained what the Geneva Convention was about and how the United States should live up to that agreement. I – I didn't have – you know, thought one way or another on it.

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observations on Faulder's case, pre-dated this Court's decision in *LaGrand*. Nevertheless, the letter presents a more convincing case for clemency than any of the United States' interventions post-*LaGrand*. Ms. Albright also offered to send Department officials to Texas to discuss the Vienna Convention with the Board, an offer that has not been repeated in any of the Department's letters to clemency authorities, post-*LaGrand*.

[311] *Faulder v. Texas Board of Pardons and Paroles, et. al.*, No. A-98-CA-801, *supra*, at p.7.

[312] *Id.*, at p.5.

> Q: What did you think about what her – you know, the eleven pages of observations about the Faulder case; what did you think about that?
>
> A: Well, my thought was – did she review the case? And I mean, how could she recommend things, that perhaps she hadn't read the case or –
>
> Q: Did you know whether she had read the case or reviewed the case?
>
> A: No. I'm assuming she didn't.[313]

266. Several Board members admitted that they did not read clemency petitions line for line.[314] After two days of testimony, the court observed:

> It is abundantly clear the Texas clemency procedure is extremely poor and certainly minimal. Legislatively, there is a dearth of meaningful procedure. Administratively, the goal is more to protect the secrecy and autonomy of the system rather than carrying out an efficient, legally sound system. . . . Giving reasons for its decisions and/or holding hearings to allow petitioners and other interested parties to present evidence would not threaten the employment of the Huntsville executioner.[315]

267. The court went on to note that a flip of the coin would provide a more merciful means of deciding clemency applications than the Board's unwavering denial of such requests.[316]

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[313] *Faulder v. Texas Board of Pardons and Paroles, et. al.*, No. A-98-CA-801, at 269-70 (Transcript of Evidentiary Hearing December 21-22, 1998), Annex 31.

[314] *Faulder v. Texas Board of Pardons and Paroles, et al.*, No. A-98-CA-801, slip op. at 15 (W.D. Tx December 28, 1998).

[315] *Id.* at 16.

[316] *Ibid.*; *see also* Alan Berlow, *The Texas Clemency Memos*, The Atlantic (July/Aug. 2003) (observing that in the case of Mexican national Irineo Tristan

268. Finally, contrary to what the United States suggested in oral proceedings on Mexico's Request for Provisional Measures, clemency review is not exempt from procedural barriers that may prohibit consideration of an otherwise meritorious petition. On 10 March 2003 the Texas Board of Pardons and Paroles announced that it would not consider a request for clemency in the case of Delma Banks because the request was filed after a deadline requiring submission at least 21 days before execution dates. Lawyers missed the deadline by 7 days.[317]

269. Some states' procedures also limit the scope of the issues that may be considered in a clemency petition. In Utah, for example, judicial issues that have been or should have been raised through the courts must *not* be considered by the Board of Pardon and Parole.[318]

c. Violations of the Vienna Convention Are Given No Weight In Clemency Review.

270. Between 1988 and 2002, twenty confirmed foreign nationals were executed in the United States.[319] In that same time period, no executive commutations were granted to foreign nationals under sentence of death. Clemency applications citing consular rights violations were filed in more than half of the cases resulting in executions, to no avail.[320]

Montoya, the Governor's legal counsel did not even mention the Article 36 violation in his memorandum briefing the case for former Governor George Bush, even though the State Department had intervened in the case).

[317] W. Gardner Selby, *Ex-FBI boss helping inmate*, San Antonio Express-News, March 11, 2003, at 2B. Attorneys for Banks (including a former Director of the Federal Bureau of Investigations) had raised a number of compelling claims including actual innocence, the use by the prosecution of unreliable informants and the withholding of a crucial witness interview for 19 years.

[318] Utah Code Ann. § 77-27-5.5 (6) (1994).

[319] Death Penalty Information Center, *Foreign Nationals and the Death Penalty in the United States*, available at <http://www.deathpenaltyinfo.org/Article.php?scid=31&did=582#executed> (last visited 14 June 2003).

[320] *See, e.g.*, Declaration of Denise I. Young, paras. 7-10, Annex 5. Cases in which violations of Article 36 were cited in clemency applications include

271. Thai national Jaturun Siripongs was executed in California in 1998. Mr. Sirpongs was never informed of his consular rights, and his trial attorney had failed to conduct any investigation into his client's background and upbringing in Thailand. With the belated assistance of Thai authorities, fifty witnesses were located years after the trial who "would have provided compelling testimony about Siripongs' life and [good] character."[321] Both the Thai foreign ministry and Thailand's ambassador to the United States wrote to the Governor of California, seeking the commutation of the death sentence. Governor Wilson stated that "the plea from Thailand's ambassador was eloquent and dignified," but added, "[t]he fact that in this case a foreign national committed the crime should not make a difference under our system of law, which treats everyone as an individual."[322] During his two terms as governor, Wilson rejected all five requests he received for clemency in capital cases.[323]

272. In 1999, Nevada authorities rejected pleas by the Philippine government and executed Filipino national Alvaro Calambro, who had refused to file an appeal. Calambro's attorney noted that his client had an IQ of 71 and did not appear to understand the appellate process. Philippine officials argued that the execution would violate the Vienna Convention because they were not notified of Calambro's arrest in 1994, leaving him with inadequate legal representation. Attorney General Frankie Sue Del Papa responded that the U.S. Supreme Court had made clear that a foreign national imprisoned in the United States must raise alleged treaty violations in a timely manner, which Calambro had failed to do. Efforts by the Philippine government to persuade Governor

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Carlos Santana, Ramon Montoya, Irineo Tristan Montoya, Mario Murphy, Angel Breard, Jose Villafuerte, Jaturun Siripongs, Karl LaGrand, Walter LaGrand, Alvaro Calambro, Stanley Faulder, Miguel Flores, Javier Suárez Medina and Mir Aimal Kasi.

[321] Additional case information is available from Death Penalty Focus, at <http://www.deathpenalty.org/old_site/current/Siripongs/jsinfo.html> (last visited 14 June 2003).

[322] *Id.*, at 6B.

[323] Associated Press, *Wilson denies clemency to Siripongs*, November 14, 1998. <http://www.ccadp.org/siripongs.html> (last visited on 14 June 2003).

Kenny Guinn to commute the sentence were rejected. After meeting with diplomatic representatives, Guinn declared: "Since neither I nor the Pardons Board have seen any compelling evidence that would warrant a delay, I have no choice but to uphold the laws and constitution of the state of Nevada".[324]

273. Post-*LaGrand* cases have fared no better. In 2001, in the case of Mexican national Gerardo Valdez, the Oklahoma Pardon and Parole Board recommended commutation after reviewing extensive evidence gathered with the assistance of Mexico consular officers. Governor Keating subsequently refused to follow the Board's recommendation, even though it came as the result of the direct presentation of evidence at a full and open hearing.[325]

274. Similarly, in response to the imminent execution of Javier Suárez Medina, the State Department requested the Texas Board to give "specific consideration" to the admitted Article 36 violation in his case and to give written reasons for its decision.[326] The Board unanimously denied the request for a reprieve and for commutation on August 13, 2002, giving no specific reasons, written or otherwise, for its decision.[327]

d. Clemency Authorities Pay Little Or No Heed To The Department Of State.

275. The U.S. Department of State frequently responds to the imminent executions of foreign nationals deprived of their consular

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[324] S. Whaley, *Efforts to Postpone, Prevent Execution Fail*, Las Vegas Review-Journal, 3 April 1999.

[325] Amnesty International, *A Time for Action: Protecting the Consular Rights of Foreign Nationals Facing the Death Penalty*, page 9, AI Index: AMR 51/106/2001.

[326] Letter from William H. Taft IV to Mr. Gerald Garrett, 5 August 2002, Annex 25.

[327] According to Board Chairman Gerald Garrett, "We took into account all that was presented to us in support of the argument for commutation and voted to recommend against it." K. Murray, *Planned Texas Execution of Mexican Upsets Ties*, Reuters News Agency, 13 August 2002.

rights by calling on state authorities to investigate the Article 36 violation, or by requesting "serious consideration" of the treaty breach as grounds for clemency. Neither approach has influenced the outcome of even a single case and state authorities routinely brush aside these interventions.

276. As noted above, in November of 1998, then-Secretary of State Madeleine K. Albright wrote personally to the Chairman of the Texas Board of Pardons and Paroles, expressing deep concern over the Article 36 violation in the case of Canadian national Stanley Faulder.[328] Although Albright's letter and an accompanying 12-page memorandum on the effects of the violation on the quality of Faulder's trial defense were circulated to the Board members, the Board voted unanimously not to recommend clemency. Less than a month later, during a court hearing into the Texas clemency process, no member of the Board could recall any details of the Secretary of State's submissions.[329]

277. In response to State Department interventions in the case of Mexican national Mario Benjamin Murphy, the Governor of Virginia publicly "disputed whether it was Virginia's responsibility to notify Murphy, a foreigner on death row, of his Vienna Convention right".[330] Ignoring the fact that the courts had dismissed Murphy's appeal of the consular rights violation as procedurally defaulted, Governor Allen denied commutation on the grounds that "the issues raised on clemency ...were issues that were available to be considered in the courts and were so considered."[331]

278. In the case of Mexican national Irineo Tristan Montoya, the General Counsel to Texas Governor George W. Bush declined a State

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[328] Letter from the Hon. Madeleine K. Albright to Mr. Victor Rodriguez, November 27, 1998, Annex 29.

[329] Amnesty International, *Killing without Mercy: Clemency Procedures in Texas, supra*, p.7.

[330] F. Green, *Mission Chief Urges Allen to Commute Sentence*, Richmond Times-Dispatch, 17 September 1997, at A1.

[331] Commonwealth of Virginia Office of the Governor, *Statement of Governor George Allen Re: Mario Benjamin Murphy*, press release of 17 September 1997.

Department request to investigate and assess the Article 36 violation on the grounds that "the State of Texas is not a signatory to the Vienna Convention." [332] Montoya was executed two days later, after the Texas Board voted unanimously not to recommend clemency. Despite the lack of any meaningful judicial consideration of the treaty violation due to procedural default, Governor Bush refused to grant a reprieve, declaring that the courts "have had ample opportunity to address all of the issues involved."[333]

279. In any event, the Department of State has deliberately and publicly minimized its role in affording "review and reconsideration" through the clemency process. In response to media enquiries regarding the Suárez case, one spokesperson for the Department stated "We have taken no position, if that's clear enough, no position on this petition. That's a matter for the Texas authorities to do. We, though, play the role of passing along this type of message from the Government of Mexico."[334] Another spokesperson declared that the case "involves the State Department in some small regard."[335]

e. The Shortcomings of Clemency Review Preclude Meaningful Review and Reconsideration.

280. Any one of the points addressed above would be sufficient in itself to refute the notion that clemency review can provide meaningful "review and reconsideration." In short, clemency review is no surrogate for judicial procedures that guarantee due process, representation by

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[332] Al Kamen, *Virtually Blushing*, Washington Post, 23 June 1997, at A17.

[333] J. Pierpoint, *Court Rejects Mexican's Final Appeal*, Reuters News Agency, 18 June 1997.

[334] U.S. Department of State, *Daily Press Briefing*, Washington, DC, August 13, 2002, p.10, *available at*: <http://www.state.gov/r/pa/prs/ dpb/2002/12644.htm> (last visited 14 June 2003).

[335] U.S. Department of State, *National Security Council Briefing for Foreign Media*, Washington, DC, August 14, 2002, *available at*: <http://fpc.state.gov/12693.htm> (last visited 14 June 2003).

counsel, and decisions made in accordance with legal standards reviewed by higher courts.

281. The United States made clear at the provisional measures hearing that, in its view, it suffices that executive authorities of its constituent states have the authority — *not* the legal obligation — to review and reconsider a sentence and grant clemency based on a violation of the Convention.[336] Mexico disagrees.

282. Article 36(2) creates a *legal* obligation. It mandates a meaningful remedy under the municipal *laws* of each State party, not a theoretical political remedy that exists, if at all, as a matter of executive grace. The specific remedy need not be the same for each State — and given the diverse legal and political systems of States parties, almost certainly will not be the same. To construe "full effect" not to require some legal remedy, however, would be to eviscerate Article 36(2) altogether.

4. The United States Did Not Enjoy Unlimited Choice of Means But Was Obliged to Choose Means that Give "Full Effect" to the Purposes for Article 36.

283. The United States seriously misapplies the Court's holding in *LaGrand* when it insists that it enjoyed unlimited "choice of means." The means chosen must be designed to achieve the result, that is to provide an effective remedy that gives full effect to the obligations of the Vienna Convention. If the U.S. legal system does not provide the necessary means to afford an effective remedy, as the United States seems to have conceded, then the United States is under an obligation to amend its domestic laws. The provision of a wholly discretionary process that may or may not review or reconsider the violation of Article 36 and its effects is patently insufficient to satisfy the requirements of Article 36(2).

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[336] CR2003/02 (Brown), para.3.10.

a. The Means Chosen must be Designed to Achieve the Result and must Achieve an Effective Remedy.

284. The United States is incorrect to argue that there is no obligation of result. Under international law, the United States is required to take whatever action is necessary to give effect to its treaty obligations. Hence, the obligation of the result sought in this case is the fulfillment of the United States's treaty commitment in Article 36 of the Vienna Convention.

285. The precise manner by which the United States seeks to fulfill its obligations is a matter of domestic law. What domestic law mechanisms are utilized is not relevant, provided that those mechanisms uphold the international legal obligations of the United States. Under the well-established jurisprudence of this Court, the United States may not assert its domestic law as an excuse for evading any of the obligations incumbent on it under international law.[337] As provided in Article 31 of the ILC Articles on State Responsibility, a State responsible for an internationally wrongful act "may not rely on the provisions of its internal law as justification for failure to comply" with its obligations to make full reparation for the injury caused.[338] Hence, the United States

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[337] *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory, Advisory Opinion, 1932,* P.C.I.J., Series A/B, No. 44, p. 4; *Free Zones of Upper Savoy and the District of Gex, Free Zones of Upper Savoy and the District of Gex, Judgment, 1932,* P.C.I.J., Series A/B, No. 46, p. 167. *See also Greco-Bulgarian "Communities", Advisory Opinion, 1930,* P.C.I.J., Series B, No. 17, p.32; *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion,* I.C.J. Reports 1949, at p. 180; *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion of 29 April 1999, I.C.J. Reports 1999,* para. 62.

[338] *See also* Article 27 of the Vienna Convention on the Law of Treaties which provides that "a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." The principle has also been applied by numerous arbitral tribunals. *See, e.g.*, the "*Alabama*" case, in Moore, IV International Arbitrations 4144, 4156-57 (1872); *Norwegian Shipowners' Claims* (Norway/United States of America), 1 RIAA 309, 331 (1922); *Tinoco* case (United Kingdom/Costa Rica), 1 RIAA 371 (1923); *Shufeldt Claim,* 2 RIAA, 1081, 1098 (1930); *Wollemborg* case, 14 RIAA 283, 289 (1956).

cannot choose domestic means that do not allow it to comply fully with the international obligation.[339]

286. It does not matter whether the United States intended those means to provide effective review and reconsideration, if they in fact do not achieve that result. As the ILC remarked in its 1977 Report,

> where it is found that the situation created *in concreto* by the State, by taking one or other of the courses between which it had the initial choice, is incompatible with the result required by the obligation, the State will obviously not be able to claim that it has discharged its obligations through, for example, the adoption of measures by which it hoped to achieve the result required by the international obligation.[340]

287. Insisting on an effective remedy is an obvious recourse against the denial of rights, and in requiring that the United States provide an effective remedy, the Court is acting consistently with other international

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[339] Dionisio Anzilotti, former President of the Permanent Court of International Justice, stated:

> [L]a liberté que le droit international laisse à l'État dans le choix des moyens pour l'accomplissement des devoirs qui lui sont imposés ne doit pas rendre l'accomplissement même de ces devoirs moins sûr ou incertain....[I]l faut que l'accomplissement de ses obligations internationales soit en tout cas assuré; et lorsque cet accomplissement dépend, de quelque façon que ce soit, des lois ou de l'organisation intérieure de l'État, c'est à celui-ci de promulguer les règles et de se donner l'organisation nécessaires à assurer la conduite voulue par le droit international. Sans quoi, il n'y aurait plus aucune garantie de la réalisation du droit international, tout État pouvant toujours, en prenant prétexte ou moyen de son organisation et de ses lois, retarder ou rendre impossible l'exécution des devoirs qui lui sont imposés.

D. Anzilotti, *La responsabilité internationale des États à raison des dommages soufferts par des étrangers*, in Opere di Dionisio Anzilotti, 149, 177 (1956) (citations omitted).

[340] ILC Yearbook 1977, Vol.II, Part 2, comments to draft Article 21, at para. 26.

courts and tribunals.[341] Human rights courts, for example, require remedies that address the relevant violation and that provide appropriate relief to the victim of the violation.

288. In the *Las Palmeras* case, for instance, the Inter-American Court explained that "[i]t is the *jurisprudence constante* of this Court that it is not enough that such recourses exist formally; they must be effective."[342] The Court has also explained that, in order to be "effective," a remedy "must give results or responses to the violations of rights established in the Convention."[343] Remedies that "prove illusory

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[341] Article 2(3)(a) of the ICCPR, for example, requires States Parties "[t]o ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity." Article 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms provides that "[e]veryone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity." Article 25 of the American Convention on Human Rights also supports the availability of an effective remedy for the violation of its terms, as it provides: "Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violation his fundamental rights...".

[342] *See The Mayagna (Sumo) Awas Tingni Case*, Judgment of August 31, 2001, Series C, No. 79, paras 111-113; *Constitutional Court Case*, Judgment of January 31, 2001. Series C No. 71, para. 90; *Bámaca Velásquez Case*, Judgment of November 25, 2000, Series C No. 70, para. 191; *Cesti Hurtado Case*, Judgment of September 29, 1999. Series C No. 56, para. 125; *Paniagua Morales et al. Case, supra*, para. 164; *Suárez Rosero Case*, Judgment of November 12, 1997. Series C No. 35, para. 63; *Godínez Cruz Case*, Judgment of January 20, 1989, Series C No. 5, para. 66; *Velásquez Rodríguez Case*, Judgment of July 29, 1988, Series C No. 4, para. 63, and *Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 of the American Convention on Human Rights)*, Advisory Opinion OC-9/87 of October 6, 1987. Series A No. 9, para. 24.

343 *See, inter alia, Constitutional Court Case, supra,* para. 89, and *Bámaca Velásquez Case, supra*, para. 191.

due to the general situation of the country or even the particular circumstances of any given case, cannot be considered effective."[344]

289. Likewise, the European Court of Human Rights has held that a remedy is effective if the injured party is entitled to invoke it,[345] and the remedy entails an examination of the substance of the right violated by the State and grants appropriate relief.[346]

290. Hence, the means chosen by the United States can provide an effective remedy only if the accused has access to the remedy as a matter of law, and if that remedy provides a review and reconsideration of the conviction and sentence to address the "violation of the rights set forth in the Convention," and if it provides adequate relief.

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344 *See Bámaca Velásquez Case, supra*, para. 191; *Ivcher Bronstein Case,*, Judgment of 6 February 2001, Series C No. 74, para. 136; Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 of the American Convention on Human Rights, supra, at para. 24.

345 *See, e.g.*, A. Drzemczewski & C. Giakoumopoulos, Article 13, in: L.E. Pettiti, E. Décaux & P.H. Imbert, La Convention Européenne des Droits de l'Homme, Commentaire Article par Article,455, 467 ("En principe, le recours doit être accessible à l'intéressé lui-même, en ce sens que celui-ci doit avoir la qualité de partie devant l'instance nationale et surtout être à même d'intenter le recours et déclencher la procédure nationale"); *Plattform "Ärzte für das Leben" v. Austria, App. No. 10126/82, Eur. Comm'n H.R. (Series A, No.139),* 29-32, ¶¶ 107-111, 115, 119.

346 *See, e.g.*, A. Drzemczewski & C. Giakoumopoulos, *supra*, 467 ("Le recours doit être adéquate, à savoir, organisé de manière à permettre de dénoncer la violation alléguée de la Convention."); *see also The Soering*, Judgment of July 7, 1989, Eur. Ct. H.R. (Series A, No.161), para. 120; *Silver and Others*, Judgment of March 25, 1983, Eur. Ct. H.R., (Series A, No. 61), para. 113 (a) (victim "should have a remedy before a national authority in order both to have his claim decided and, if appropriate, to obtain redress").

b. If Necessary, The United States was Required to Change its Domestic Law to Conform Fully with its International Legal Obligations.

291. If the domestic laws of the United States make it impossible for officials of the United States to give "full effect" to the purposes of Article 36 as interpreted by this Court, the United States is under an obligation to modify those domestic laws.

292. It is well-established that a State that is party to a treaty must, if necessary, modify its domestic law in order to ensure proper compliance with the obligations it has assumed. As the Permanent Court held in its opinion concerning the *Exchange of Greek and Turkish Populations*, "a State which has contracted valid international obligations is bound to make in its legislation such modifications as may be necessary to ensure the fulfillment of the obligations undertaken."[347]

293. The Inter-American Court likewise observed that a State that has ratified a treaty "must introduce the necessary modifications to its domestic law to ensure the proper compliance with the obligations it has assumed."[348]

294. Notably, as the U.S. Secretary of State noted long-ago:

> Nor is a change of municipal law to meet the exigencies of international intercourse without precedent in the United States. In the case of McLeod, in 1842, when, in reply to the demand of the British Government for the release of the prisoner. . . . Congress amended the law regulating the issuance of writs of habeas corpus so as to facilitate the performance by the

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[347] *Exchange of Greek and Turkish Populations, 1925, P.C.I.J., Series B, No. 10*, p.20.

[348] "*The Last Temptation of Christ Case*" *(Olemdo Bustos et al.)*, Judgment of 5 February 2001, Inter-Am. Ct. H.R., Series C No. 73 (2001), paras. 85 and 87.

Government of the United States of its international obligations.[349]

295. Finally, the *travaux* of the Vienna Convention confirm that there can be no question that the State delegates who adopted the Convention were fully aware that Article 36(2), in particular, could require changes to a State's municipal laws or regulations in order for those laws and regulations to enable full effect to be given to Article 36.

296. State delegates dismissed the concern raised by Romania's delegate after the United Kingdom's amendment to replace the concept of "shall not nullify" with the language ultimately adopted, Article 36(2) would purport to "codify criminal law or criminal procedure."[350] The Romanian delegate continued that Article 36(2) "could not possibly attempt to modify the criminal laws and regulations or the criminal procedure of the receiving State."[351] The Soviet Union objected that as revised, Article 36(2) would "bring back an unsatisfactory situation from the past, when the consuls of colonial powers interfered with the internal affairs of States by hampering the administration of justice in regard to aliens."[352]

297. Addressing these objections that municipal law should prevail over international law, the United Kingdom's delegate simply responded: "that objection could not apply to the rights recognized in paragraph 1 of Article 36."[353]

298. The United States may therefore choose the means to implement its international obligations under the Vienna Convention but this choice still requires a result consisting of an effective remedy that

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[349] Correspondence with Mr. Connery, Chargé to Mexico, Nov. 1, 1887, *id.* at p. 239.

[350] *Official Records*, Vol. I, p. 38 (statement of Romania).

[351] *Id.*

[352] *Official Records*, Vol. I, p. 40 (statement of the Union of Soviet Socialist Republics).

[353] *Official Records*, Vol. I, p. 348 (statement of the United Kingdom).

produced adherence with international obligations. Moreover, the choice of means cannot be constrained by the United States' domestic law. If need be, that law must be changed in order to provide a remedy that gives full effect to the Vienna Convention.

V.

THE BREACHES OF ARTICLE 36 RESULTED IN FUNDAMENTALLY UNFAIR CRIMINAL PROCEEDINGS

299. By its terms, Article 36 of the Vienna Convention confers rights upon a sending State to provide consular assistance to detained nationals.[354] Equally by its terms, as this Court held in *LaGrand*, Article 36 confers rights upon foreign nationals of the sending state, who may seek the assistance of consular officers when detained.[355]

300. Here, Mexico suffered injury both directly and in the form of injury to its nationals. As to the direct injury, the past and continuing violations of Article 36 by the United States impair Mexico's rights under the Vienna Convention to the timely exercise of its consular functions with respect to its nationals.

301. Article 31(2) of the ILC Articles on State Responsibility broadly defines the injury for which a State may claim reparation as comprising "any damage, whether material or moral." It is well-settled that a State is injured when an internationally wrongful act deprives the State of the opportunity to exercise its rights.[356] As the International Law Commission has observed:

> [w]here two States have agreed to engage in particular conduct, the failure by one State to perform the obligation necessarily

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[354] Vienna Convention, art. 36(1).

[355] *LaGrand*, para. 77.

[356] *See* R. Ago, Second Report on State Responsibility, ILC Yearbook 1970, vol.II, 195, doc. A/CN.4/233, para. 54 ("every breach of an engagement *vis-à-vis* another State and every imp airment of a subjective right of that State in itself constitutes a damage, material or moral, to that State").

> concerns the other. A promise has been broken and the right of the other State to performance correspondingly infringed.[357]

302. It is equally well-established that an injury suffered by nationals of a particular State is also an injury to the State of their nationality.[358] Hence, Mexico has been injured not only because the breaches have prevented it from providing consular assistance to Mexican nationals in capital proceedings, but because those nationals have been prevented from receiving that assistance.

303. When a receiving State's breach prevents a detained national from seeking, and a sending State from providing the consular assistance contemplated by Article 36, the ultimate injury takes the form of an unfair criminal proceeding. The consular notification and assistance provisions of Article 36 do not guarantee mere courtesies or conveniences; they have as their object to guarantee to a sending State the opportunity to ensure fair proceedings for its nationals subject to trial before the criminal authorities of a foreign State.

304. At bottom, therefore, the rights protected by Article 36 are in the nature of due process rights: that body of rights whose objective is to guarantee procedural fairness when a governmental authority charges an individual with a crime and seeks to impose criminal penalties. This case perfectly illustrates that point in the most compelling possible context: that of criminal proceedings in which the receiving State seeks the death penalty.

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[357] Draft Articles on responsibility of States for internationally wrongful acts, *Report of the International Law Commission on the work of its Fifty-third session*, Official Records of the General Assembly, 56th session, Supplement No. 10, U.N. Doc. A/56/10 (2001).

[358] *Mavrommatis Palestine Concessions, Jurisdiction, Judgment, 1924, P.C.I.J., Series A, No. 2,* at 12; s*ee also Panevezys-Saldutiskis Railway, Judgment, 1939, P.C.I.J., Series A/B, No. 76*, at 16; *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949*, at 185.

A. THE DEPRIVATION OF CONSULAR NOTIFICATION AND ASSISTANCE RENDERS CRIMINAL PROCEEDINGS FUNDAMENTALLY UNFAIR

305. The right to a fair and just criminal process is a fundamental principle in international law and implicit in the concept of ordered liberty.[359] Procedures necessary to maintaining the fair and just character of a criminal proceeding constitute the due process of the law to which every person is entitled. The International Covenant on Civil and Political Rights ("ICCPR"), binding both on Mexico and the United States, recognizes due process of the law as a right derived directly from "the inherent dignity of the human person."[360]

306. The basic components of due process are widely recognized. Article 14 of the ICCPR defines the minimum standards of due process in a criminal proceeding to include, among other things, the right to "a fair and public hearing;" the right to "full equality;" the right "to be informed promptly and in detail and in a language which [the defendant] understands of the nature and cause of the charge against him;" the right to have adequate time and facilities to prepare a defense and to communicate with counsel of his own choosing; the right to have the free assistance of an interpreter in court, if necessary; and the right "not to be compelled to testify against himself or to confess guilt."[361]

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[359] *See e.g.*, C. Safferling, *Towards an International Criminal Procedure* (2001) pp. 20-21 ("[F]or the criminal trial[,] [f]airness is absolutely essential in order to arrive at a just verdict. ...This discourse is not limited to the determination of the facts and the assurance of proof but is concerned also with the personality of the perpetrator, how far he can be held responsible, and how much punishment should be imposed. Procedural fairness is crucial for the realization of justice in a democratic society").

[360] *International Covenant on Civil and Political Rights*, Dec. 19, 1966, *Preamble*, para. 3. 9.9.9. U.N.T.S. 171 (*entered into force* Mar. 23, 1976) [hereinafter ICCPR]. *Cf.* Universal Declaration, art. 10; *Prosecutor v. Delalic et al.*, , Decision on the Admissibility of Handwriting Evidence, 19 January 1998, ICTY, Case No. IT-96-21, at para.59 (affirming that "[i]t is the sacred and solemn duty of every judicial institution to respect and give benevolent construction to the provisions guaranteeing [fair trial] rights").

[361] *ICCPR*, art. 14.

307. A departure from the requirements of procedural fairness renders illegitimate any conviction or sentence resulting from the flawed proceedings. As the Inter-American Court has stated, "[t]he legitimacy of [a] judgment rests upon the legitimacy of the process."[362] This principle applies with special force in death penalty cases, where the "penalty is irreversible" and "the strictest and most rigorous enforcement of judicial guarantees is required of the State so that those guarantees are not violated and a human life not arbitrarily taken as a result."[363]

308. Consular notification constitutes a basic component of due process by ensuring both the procedural equality of a foreign national in the criminal process and the enforcement of the other fundamental due process guarantees to which that national is entitled. It is therefore an essential requirement for fair criminal proceedings against foreign nationals.

1. Consular Notification Is Necessary to Ensure the Procedural Equality of Foreign Nationals in the Criminal Process.

309. Due process guarantees recognize – and attempt to redress – the disparity of power between a prosecuting governmental authority and a criminal defendant. They provide the procedural equality essential to enable the defendant to defend his interests effectively.[364] As the Inter-American Court has stated:

> To accomplish its objectives, the judicial process must correct any real disadvantages that those brought before the bar might have, thus observing the principle of equality before the law and the courts and the corollary

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[362] *Castillo Petruzzi et al.* Case, Judgment of May 30, 1999, ¶ 219, Inter-Am. Ct. H.R. (Ser. C) No. 52 (1999).

[363] *Adv. Opinion OC-16*, para. 136.

[364] *Adv. Opinion OC-16*, para. 117 ("For 'the due process of law' a defendant must be able to exercise his rights and defend his interests effectively and in full procedural equality with other defendants"); *see also Delcourt v. Belgium, Judgment (Merits) of 17 January 1970,* Eur. Ct. H.R. 2689/65/A-11, at para. 28.

> principle prohibiting discrimination. The presence of real disadvantages necessitates countervailing measures that help to reduce or eliminate the obstacles and deficiencies that impair or diminish an effective defense of one's interests. Absent those countervailing measures, . . . one could hardly say that those who have the disadvantages enjoy a true opportunity for justice and the benefit of the due process of law equal to those who do not have those disadvantages.[365]

310. Christoph Safferling makes the same point when he writes that

> it is of utmost importance that a 'fair trial' guarantees the respect for the dignity of the suspect in a situation where he is jeopardized most. Criminal proceedings must never treat the defendant like an object. The subjectivity of the person must be guaranteed, that means he must be put into a situation where he can effectively participate in the proceedings.[366]

311. The consular notification and assistance guarantees of Article 36, in turn, reflect a recognition that a foreign national facing criminal charges in a receiving State stands on a fundamentally different footing than does a national of that State.

312. Detained foreign nationals face obstacles of language and culture, unfamiliarity with the legal system, fears of deportation, and isolation from family, friends, and their community. Consular officers are uniquely well-positioned to educate their nationals concerning their legal rights and to dispel the national's culturally-rooted misconceptions of the criminal justice system.[367] In addition to acting as a "cultural bridge," consular officers provide a physical link to the information and

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[365] *Adv. Opinion OC-16*, para. 119.

[366] Safferling, *supra*, at p. 29. *See* Nihal Jayawickrama, The Judicial Application of Human Rights Law: National Regional and International Jurisprudence, at 505 (referring to the equality of arms as the principle of procedural equality of the parties at trial).

[367] *See supra* Section III.A.

individuals from the sending State that are necessary for the defense of the foreign national.[368]

313. Further, foreign nationals – and Mexican nationals in particular – are frequently subject to discriminatory treatment as a consequence of their race and immigrant status. Whether subtle or overt, shouted or murmured, bias often infects the treatment given to foreign nationals in the courtrooms, jails, and lawyers' offices of receiving states. Consular officers can detect the presence of unfair bias and raise such concerns with the appropriate authorities and, if need be, with the court itself.[369]

314. It is for these reasons that the drafters of Article 36 of the Vienna Convention recognized the right to consular notification and assistance as a basic human right. Mr. Douglas Edmonds, the United States member of the International Law Commission, for instance, urged that "[t]he protection of human rights by consuls in respect of their nationals should be the primary consideration for the Commission."[370] At the Vienna Conference, various delegates characterized the receiving States' obligation under Article 36 as "extremely important because it relates to one of the fundamental and indispensable rights of the individual."[371]

315. It is the fact that the United States has likewise recognized "consular protection as an inherent right of every citizen."[372] As the Department of State advised the United States Congress:

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[368] *See supra* Chapter III.A. (explaining the activities of consular officers in obtaining evidence and facilitating the transport of witnesses).

[369] *See supra* Section III.A. (discussing the role of consular officers in ensuring the fairness of proceedings involving foreign nationals).

[370] *Yearbook of the International Law Commission 1960 vol. I*, p. 47 (para. 41); *see also* comment by Milan Bartos, *id.*, p. 46 (para. 28).

[371] *See* Official Records, Vienna Convention on Consular Relations, U.N. Doc. No. A/Conf.25/16. *See also infra* Chapter V,B,2.

[372] *Statement of Hon. Leonard F. Walentynowicz, Administrator, Bureau of Security and Consular Affairs, Department of State*, U.S. Citizens Imprisoned in Mexico: Hearings before the Subcommittee on International Political and

> That right is not affected by evidence or findings of guilt. Nor has it anything to do with the nature of the alleged crime, be it murder, narcotics smuggling, or a minor traffic violation. Providing consular protection to American citizens arrested, detained, or imprisoned abroad is a basic historic responsibility of this Department and its consular officers.[373]

316. In that, detained foreign nationals suffer from discrete and particular vulnerabilities that Article 36 guarantees seek to redress. Those guarantees address the detainee in his capacity as foreign national, not simply as criminal defendant. For that reason, other due process guarantees, such as a right to counsel, cannot substitute for Article 36 rights.[374]

2. Consular Notification Ensures the Enforcement of Other Essential Due Process Guarantees.

317. In a very real sense, the right to be informed of potential consular assistance is the essential first step for detained foreign nationals to the exercise or waiver of their right against self-incrimination, to the effective assistance of counsel, and to the opportunity to prepare a defense. When the mandates of Article 36(1) are violated, the due process rights of detained foreign nationals are necessarily undermined and the procedural protections that characterize a fair and just criminal proceeding lose their meaning.[375]

Military Affairs of the House Committee on International Relations, 94th Cong., 1st Sess. Part I, at 16 (1975).

[373] *Id.*

[374] As the Court held in *LaGrand*, the fact that "United States courts could and did examine the professional competence of counsel assigned" did not eliminate a "violation of the rights set forth in Article 36, paragraph 1" that prevents a sending state "in a timely fashion, from retaining private counsel for them and otherwise assisting in their defence as provided for by the Convention." *See LaGrand*, para. 91.

[375] M. Kadish, Article 36 of the Vienna Convention on Consular Relations: A Search for the Right to Consul, 18 *Michigan Journal International Law* (1997) at p. 609 (The deprivation of the nationals' rights under Article 36 of the Vienna

a. Right To Be Protected Against Self-Incrimination

318. Of all of the due process rights set forth in Article 14 of the ICCPR, none is more important in protecting against the danger of wrongful convictions than the right not to be compelled to confess guilt. As the United States Supreme Court has observed,

> all the careful safeguards erected around the giving of testimony, whether by an accused or any other witness, would become empty formalities in a procedure where the most compelling possible evidence of guilt, a confession, would have already been obtained at the unsupervised pleasure of the police.[376]

319. It is during interrogation that the singular vulnerability of foreign nationals, stemming from their disadvantages of language and unfamiliarity with the receiving state's legal system, is most apparent and easily abused.

320. While the United States provides certain procedural protections for detainees, they are often inadequate to apprise foreign nationals of their rights. Foreign nationals are isolated, confused, and frightened and are more inclined to waive legal rights without understanding their import.[377] The rapid recital of the *Miranda* rights prior to interrogation

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Convention "raises a presump tion of prejudice"). As such, consular notification is similar to other rights, such as the right to counsel, that, when violated, cause the criminal process to lose its character as a meaningful, adversarial confrontation. In the United States, when a defendant has actually or constructively received no assistance of counsel, "the adversary process [is] itself presumptively unreliable." *United States v. Cronic*, 466 U.S. 648, 659 (1984).

[376] *Miranda,* 384 U.S. at 466 (citing *Mapp v. Ohio*, 367 U.S. 643, 685 (1961) (Harlan, J., dissenting)).

[377] For instance, the approximately thirty-eight Mexican nationals in the Application gave statements to United States law enforcement officers prior to being notified of their consular rights. In many cases, the statements were used as the principal – if not the only – evidence of the defendant's guilt. *See* Declaration of Roberto Rodríguez, Exhibit A (detailed case summaries), Annex 7. As one commentator has noted, a suspect's statements to the police can

may pass unnoticed by a foreign national for whom English is not his primary language.[378] Detained Mexican nationals, as result of the differences between the United States and Mexican criminal justice systems, are particularly apt to misunderstand the significance of early questioning. The consequence of these disadvantages is that foreign nationals may falsely confess to crimes they did not commit.[379]

321. The presence of consular officials throughout interrogation provides an essential safeguard against such abuses, and undoubtedly "enhances the integrity of the fact-finding processes in court."[380] Thus, the foreign national's right to seek the guidance of consular officers is essential to an intelligent, voluntary, and informed decision whether to exercise his right to remain silent in the face of interrogation.

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fatally undermine his credibility before the jury, even when they are, on their face, non-incriminating. N. Jayawickrama, *The Judicial Application of Human Rights Law: National Regional and International Jurisprudence* (2002) at p. 576.

[378] *See* Declaration of Roseann Dueñas Gonzalez, Annex 4; *supra* Chapter III.A. When Mexican national Virgilio Maldonado was arrested, for example, he spoke only Spanish, had less than a first grade education, and was mentally retarded. Although the police informed him of his *Miranda* rights, including his right to have an attorney present while he was interrogated, the interrogating officers spent only *39 seconds* reading those rights to Mr. Maldonado, and did not in any way attempt to explain them. He subsequently confessed in response to interrogation. At trial, prosecutors relied heavily on his confession to obtain a conviction, since there was virtually no other evidence tying him to the crime. Mr. Maldonado's case, listed #32 in Mexico's Application, is fully described in Declaration of Roberto Rodríguez, Exhibit A, para. 220-228, Annex 7.

[379] *See* Declaration of Roseann Dueñas Gonzalez, para. 36 (describing the case of Mexican national Omar Aguirre) , Annex 4. Researchers have documented several cases in which innocent defendants falsely confessed to murders they did not commit, and were then sentenced to death on the basis of that confession. *See, e.g.,* Center on Wrongful Convictions, *Causes and Remedies: False Confessions* (February 2002)(available at http://www.law.northwestern.edu/depts/clinic/wrongful/documents/FalseConfRptl.htm) (last visited 17 June 2003).

[380] *See supra* Center on Wrongful Convictions.

b. Effective Assistance of Counsel

322. Just as the right to be protected against self-incrimination is essential to prevent coerced or false confessions, the right to counsel is fundamental to ensuring equality of arms between the government and an individual accused of a crime.[381] While all criminal defendants have the right to effective legal representation,[382] no one requires the assistance of competent counsel more than a defendant facing the death penalty.[383]

323. The right to consular notification and access is necessary to ensure the effective assistance of counsel. The Vienna Convention expressly states that "[c]onsular functions consist in: ... representing or arranging appropriate representation for nationals of the sending State before the tribunals and other authorities of the receiving State."[384]

324. Indeed, the importance of consular assistance in securing counsel was recognized by Robert J. McCloskey, the then Assistant Secretary of State for Congressional Relations:

> [E]arly notification of arrest . . . will . . . . further enable us to make available to [the detained American citizen]

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[381] The right of the accused to be assisted by legal counsel is set forth in virtually every international instrument dealing with the rights of accused persons. *See, e.g.*, ICCPR, Art. 14(3)(d); European Convention on Human Rights and Fundamental Freedoms, 4 Nov. 1950, 213 U.N.T.S. 221, *entered into force* 3 Sept. 1953, Art. 6(3)(c); American Convention on Human Rights, 22 Nov. 1969, 1144 U.N.T.S. 123, *entered into force* 18 July 1978, Art. 8(2)(d) and 8(2)(e).

[382] *See supra* Chapter III.A.

[383] *See supra* Chapter III.A. (discussing the procedures in a capital proceedings). The Court has already observed in *LaGrand* that violations of Article 36 in cases involving severe penalties or prolonged incarceration merit special consideration. *See LaGrand*, paras. 63, 123. Nowhere is this more appropriate than in a case in which a national's very life is at stake.

[384] Vienna Convention, art. 5(i).

information regarding the judicial system and the obtaining of responsible legal counsel.[385]

325. Like the United States, Mexico, when notified of a detained national, attempts to secure and assist legal counsel for that national. In particular, Mexican consular officers receive special training so that they may effectively monitor and support defense counsel in capital proceedings.[386] Should counsel fail in his duty to provide competent representation, consular officers do not hesitate to intervene.[387] Through these efforts, consular officers have enhanced the quality of legal representation for their nationals in innumerable cases.

c. The Rights To Present a Defense and To Collect and Present Evidence.

326. Article 14(3)(e) of the ICCPR guarantees the right of the accused to "have adequate time and facilities for the preparation of his defence" and to "obtain the attendance of witnesses on his behalf under the same conditions as witnesses against him."[388]

327. Foreign nationals facing the death penalty suffer the twin disadvantages of indigence and geographic separation from their home countries.[389] Together, these disabilities make it nearly impossible for

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[385] *Letter from Hon. Robert J. McCloskey, supra,* at 37.

[386] *See supra* Chapter III.A. Declaration of Roberto Rodríguez Hernández at para. 7.

[387] *See, e.g.,* Declaration of Michael Iaria, para. 5, Annex 6.

[388] These rights are reiterated in the European Convention, Articles 6(3)(b) and 6(3)(d); the American Convention, Articles 8(2)(c) and 8(2)(f); and the African Charter on Human and People's Rights, 27 June 1981, OAU, document CAB/LEG/67/3/Rev.5; 21 I.L.M. 58, *entered into force* 21 Oct. 1986, Article 7(1)(c).

[389] Even if a foreign national has lived in the United States for years, crucial mitigation is invariably located in his home country. A thorough mitigation investigation is multi-generational, and "encompasses all the forces which molded the client's life, both nature and nurture, the confluence and convergence of genetic predispositions and environmental influences... Investigation of the

foreign nationals to marshal the evidence critical to their defense, both at the guilt and penalty phases of a capital proceeding.

328. There is an enormous disparity in the resources available to the governmental entity that prosecutes crimes and the foreign national, who is isolated from family and friends and without the means of gathering evidence to present a defense. Many states, including the United States, simply do not provide the financial resources necessary to undertake an investigation in a foreign country, or for the bilingual experts essential in the defense of a criminal case.[390]

329. The collection of mitigating and other relevant evidence from the sending State is a fundamental consular activity. When a sending State's nationals are tried and sentenced in a foreign country, consular officers are often the singular conduit for the receipt and transmission of information from the sending State. Vital information about a defendant's education, mental capacity, health or social situation may only be accessible through state agencies. Consulates may organize psychological and neuropsychological testing, if necessary. Consular officers are also uniquely well-situated to locate, transport, and arrange visas for otherwise unavailable witnesses so that they may testify on the national's behalf.[391]

330. When deprived of the right to seek consular assistance, a detained foreign national, particularly in a capital murder proceeding, stands in deadly peril. Given his undeniable vulnerability, the inherent disparity in resources between the receiving state and the individual defendant, and the indispensable role of consular officers in ensuring the fundamental fairness of the proceedings, his right to seek consular

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client's childhood includes the climate of caregiving in the home, the quality of relationships, hygiene, nutrition, education, exposure to toxins (in the air, in the dwelling, in utero, etc.)..." R. Stetler Mitigation Evidence in Death Penalty Cases, *The Champion* (January/February 1999) available at <http://www.criminaljustice.org > (last visited 2 May 2003).

[390] *See supra* Chapter III.A.

[391] *See supra* Chapter III.A.

assistance can only be characterized as a basic component of due process.

B. CONSULAR NOTIFICATION HAS BEEN WIDELY RECOGNIZED AS A FUNDAMENTAL DUE PROCESS RIGHT AND, INDEED, A HUMAN RIGHT

1. Consular Notification Has Been Internationally Recognized as an Essential Element of Due Process

331. "Due process is not a static concept, it undergoes evolutionary change to take into account accepted current notions of fairness."[392] Developments in international law confirm the status of consular notification as "among the minimum guarantees essential to providing foreign nationals the opportunity to adequately prepare their defense and receive a fair trial."[393] The fundamental due process character of the right to consular access, and indeed its character as a human right, has been recognized by the Inter-American Court of Human Rights, treaty-law, State practice, and academic literature.

332. *First*, the Inter-American Court of Human Rights, in its recent Advisory Opinion on the *Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*[394]

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[392] *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382, 1388 (10th Cir. 1981) (considering international law principles for notions of fairness in affirming writ of habeas corpus for excludable Cuban refugee who was being detained in federal prison); *see also* V. Uribe, Consuls as Work: Universal Instruments of Human Rights and Consular Protection in the Context of Criminal Justice, 19 *Houston Journal International Law* (1997) at p. 390 (noting the evolution of the concept of due process in American jurisprudence, citing the Restatement (Third) of the Foreign Relations Law of the United States § 711, cmt. a (1986)). Notions of due process have evolved considerably in the United States, for example, since the inception of the Vienna Consular Convention. *See e.g.*, *Washington v. Texas*, 388 U.S. 14 (1967) (ensuring the right to compulsory process for the purpose of obtaining favorable witnesses); *Miranda v. Arizona*, 384 U.S. 436 (1966) (excluding confessions without informing the defendant of his right to an attorney).

[393] *Advisory Opinion OC-16*, at para. 122.

[394] *See supra* Chapter III.D.3 (discussing the opinion more fully).

unequivocally held that the right to prompt consular access under Article 36 (1) "must be recognized and counted among the minimum guarantees essential to providing foreign nationals the opportunity to adequately prepare their defense and receive a fair trial."[395] The Court unanimously resolved:

> That the individual's right to information established in Article 36(1)(b) of the Vienna Convention on Consular Relations allows the right to the due process of law recognized in Article 14 of the International Covenant on Civil and Political Rights to have practical effects in concrete cases; Article 14 establishes minimum guarantees that can be amplified in the light of other international instruments such as the Vienna Convention on Consular Relations, which expand the scope of the protection afforded to the accused.[396]

333. *Second*, a number of international instruments on the individual rights of foreigners expressly include the right provided for by Article 36 of the Vienna Convention and confirm that the right to consular notification under Article 36 (1) is an essential element of due process. The 1984 United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, is an example in point. It provides in Article 6.3 that

> [a]ny person in custody pursuant to paragraph 1 of this Article shall be assisted in communicating immediately with the nearest

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[395] *Adv. Opinion OC-16*, para. 122.

[396] *Id.* para. 141.6. *See also id.* para. 23 for the position taken by the Inter-American Commission in its written submissions in the OC-16 proceedings, stating that "the very objective of the notification provision of Article 36 . . . is to ensure that alien detainees—who may not enjoy 'equality of arms' with the detaining authority—benefit from consultation with their consul. That consultation, and notification thereof, provide a means to ensure that the conditions are met which will protect the right of the alien detainee to a trial conducted with due guarantees. The notification provision of Article 36 thus plays a role in, and is integrally linked to ensuring due process.... The failure of a party to the Vienna Convention to carry out its treaty based commitment may, in either case, implicate the due process guarantees of the inter-American human rights system."

appropriate representative of the State of which he is a national, or, if he is a stateless person, with the representative of the State where he usually resides.[397]

334. Another example can be found in the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, adopted by the United Nations General Assembly in December 1990. It provides in Article 16.7 that:

> [w]hen a migrant worker or a member of his or her family is arrested or committed to prison or custody pending trial or is detained in any other manner:
>
> (a) The consular or diplomatic authorities of his or her State of origin or of a State representing the interests of that State shall, if he or she so requests, be informed without delay of his or her arrest or detention and of the reasons therefore;
>
> (b) The person concerned shall have the right to communicate with the said authorities. Any communication by the person concerned to the said authorities shall be

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[397] Likewise, most of the international conventions dealing with terrorism contain a provision reflecting the obligations under Article 36(2) of the Vienna Convention. Some contain practically identical language. *See, e.g.,* 1999 OAU Convention on the Prevention and Combatting of Terrorism, art. 7(3); the 1999 International Convention for the Suppression of the Financing of Terrorism, art. 9(3); the 1997 International Convention for the Suppression of Terrorist Bombings, art. 7(3); the 1994 Convention on the Safety of United Nations and Associated Personnel, adopted on 9 December 1994, art. 17(2) (entitling any alleged offender to communicate without delay to the nearest appropriate representative of the State or States of which such person is a national); the 1979 International Convention against the taking of hostages, art. 6(3); the 1973 Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents, art. 6(2); the 1971 Convention for the suppression of unlawful acts against the safety of civil aviation, art. 6(3); the 1963 Convention on offences and certain other acts committed on board aircraft, art. 13(2). The draft International Convention for the suppression of acts of nuclear terrorism, art 10(3); and the draft Comprehensive Convention on International Terrorism, art. 10(3), currently under consideration of the UN General Assembly, contain similar provisions.

forwarded without delay, and he or she shall also have the right to receive communications sent by the said authorities without delay;

(c) The person concerned shall be informed without delay of this right and of rights deriving from relevant treaties, if any, applicable between the States concerned, to correspond and to meet with representatives of the said authorities and to make arrangements with them for his or her legal representation.[398]

335. The right to immediate consular access has further been embodied in a number of UN resolutions providing for basic human and due process rights.[399] For instance, the United Nations Declaration on the human rights of individuals who are not nationals of the country in

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[398] Article 16.5 of Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, provides that "each State Party shall comply with its obligations under the Vienna Convention on Consular Relations, where applicable, including that informing the person concerned without delay about the provisions concerning notification to and communication with consular officers." G.A. res. 55/25. 55 U.N. GAOR Supp. (No. 49) at 65, U.N. Doc. A/45/49 (Vol. I) (2001), Article 16.5.

[399] In addition, as this Court had previously noted, General Assembly resolutions, though not legally binding *stricto sensu*, may have normative value to the extent that they reflect the existence of a rule of law or the emergence of an *opinio juris*. *Legality of the Threat of the Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports, 1996,* para. 70. Although it would only be natural for international tribunals to confirm the existence of a rule of law, as Jorge Castañeda writes: "il n'existe aucune raison essentielle qui interdise à d'autres organes internationaux, largement représentatifs, d'exprimer valablement, au nom de la communauté internationale, ce qui, dans l'opinion de celle-ci, *est* le droit international a ùn moment donné." *See* J. Castañeda, *Recueil des cours*, (Collected Courses of the Hague Academy of International Law), 1970 I, Vol. 129, p.315 (les resolutions "ne créent pas le droit, mais elles peuvent prouver, avec autorité, son existence"); M. Pinto, *De la protection diplomatique a la protection des droits de l'homme*, Revue Générale de Droit International Public, 2002-3, p.545 ("Cet ensemble de règles de *soft law* prévoient l'assistance consulaire parmi les garanties judiciaires applicables a des étrangers.").

which they live, adopted by United Nations General Assembly on 13 December 1985, provides that:

> [a]ny alien shall be free at any time to communicate with the consulate or diplomatic mission of the State of which he or she is a national or, in their absence, with the consulate or diplomatic mission of any other State entrusted with the protection of the interests of the State of which he or she is a national in the State where he or she resides.[400]

336. *Third*, a large number of States have repeatedly affirmed the fundamental due process character of the right to consular notification and access. In the proceedings before the Inter-American Court regarding the Advisory Opinion No.16 (OC-16), for instance, seven States supported the argument that the right to consular access under Article 36(2) of the Vienna Convention constituted an important due process right.[401] Following the issuance of Advisory Opinion OC-16, eighteen States, the European Union on behalf of its fifteen member

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[400] U.N. General Assembly Resolution 40/144 of 13 December 1985, adopted without a vote. The drafting history of the declaration shows that various Governments referred to the close relationship between Art. 10 of the Declaration and Art. 36 of the Vienna Convention on Consular Relations (see U.N. Doc. E/CN.4/1354 p. 19). *See also* U.N. General Assembly Resolution A/RES/43/173 of December 9, 1988 ("Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment"), pr. 16(2); G.A. Res. 45/113 U.N. GAOR, 45th Sess., Supp. No. 49, U.N. Doc. A/RES/45/113 (1990) ("Rules for the Protection of Juveniles Deprived of their Liberty"), Rule I.56; and resolution of 23 April 2003 of the UN Commission on Human Rights regarding Migrant Rights, U.N. Document E/CN.4/2003/46, para 7.

[401] *Adv. Opinion OC-16*, para. 26. Those States were Mexico, Costa Rica, El Salvador, Guatemala, Honduras, Paraguay and the Dominican Republic. The argument was further supported by non-governmental organizations, academics, and individuals appearing before the Court. *See* Briefs of *Comisión Mexicana de Defensa y Promoción de los Derechos Humanos*, Human Rights Watch / Americas and Center for Justice and International Law; Death Penalty Focus of California; International Human Rights Law Institute of Depaul University College of Law and McArthur Justice Center; Minnesota Advocates for Human Rights and Sandra Babcock; Bonnie Lee Goldstein and William H. Wright Jr.; and Adele Shank and John Quigley, all of them appearing as *amici curiae* before the Inter-American Court of Human Rights, OC-16/99.

States, and the European Commission expressed their support of the Inter-American Court's conclusion that the right to consular access under Article 36(2) constitutes a fundamental due process right when they appeared as *amici curiae* in at least five death penalty cases[402] involving foreign nationals in the United States. In addition, nineteen states sent official communications to Governors and Boards of Pardons and Paroles in support of clemency petitions in death penalty cases involving foreign nationals.[403] The increasing support of OC-16 by foreign governments in death penalty cases involving foreign nationals strongly suggests the existence of an emerging consensus in the practice of nations.

337. *Finally*, leading scholars have likewise advocated the due process character of the right to consular access contained in Article 36(2). For Martin Mennecke, for example,

> it appears evident that a foreign national facing criminal proceedings abroad has due process related interests to consult with his consulate [and that] [t]his functional link entwining the consular communication set forth under Article 36 with due

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[402] In five cases, demarches were filed: Miguel Angel Flores; Gregory Madej; Gerardo Valdez-Maltos; Arboleda A. Ortiz, Plutarco Tello and Germán Sinisterra; and Javier Suarez-Medina. Furthermore, two judges of the Supreme Court of Illinois wrote dissenting opinions when the writ of *certiorari* requested by Mr. Gregory Madej was denied. *Illinois v. Gregory Madej*, 193 Ill. 2d 395 (Ill. 2000). Judge McMorrow observed that the Inter-American Court's holdings on OC-16 "mirror[ed] this court's own recognition that death penalty cases require a high standard of procedural accuracy." *Id.* (quotation and citation omitted). Justice Heiple observed that the consular notification requirement "is meant to ensure that foreign nationals imprisoned abroad have adequate legal representation and that they should be tried in accordance with principles of justice generally recognized in the international community." *Id.*

[403] Those States are Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Iceland, Mexico, Panama, Paraguay, Poland, Switzerland, Uruguay, and Venezuela.

process guarantees of international human rights law is even more obvious in cases involving the death penalty.[404]

338. Similarly, Eric Robert has affirmed that

> L'existence et l'application effective des droits de protection consulaire constituent pourtant un élément important des droits de la personne à l'heure ou les individus se déplacent de plus en plus souvent à l'étranger pour différentes raisons ... le but de l'Article 36 est de permettre le procès équitable des étrangers, et que les droits reconnus par cet Article, comme le reconnaissait le juriste Yasseen, sont étroitement lies aux droits de l'homme, en l'occurrence, le droit a la défense.[405]

2. Consular Notification Under Article 36 is an Essential Due Process Right and, Hence, a Human Right.

339. Because of its fundamental due process character, the right to consular notification and access without delay was already recognized by many States as a human right as early as the negotiating process of the Vienna Convention on Consular Relations. Members of the United Nations International Law Commission, and States participating in the Diplomatic Conference that adopted the Vienna Convention on Consular Relations, identified the human rights nature of consular notification and access.

340. Mr. Milan Bartos, a member of the ILC, observed during the deliberations that then Article 30 A "was intended to safeguard human rights ...."[406] He further noted that:

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[404] M. Mennecke, Towards the Humanization of the Vienna Convention of Consular Rights-The LaGrand Case Before the International Court of Justice, *German Yearbook of International Law*, Vol.44, 2001, p.453.

[405] E. Robert, *La protection consulaire des nationaux en péril? Les ordonnances en indication de mesures conservatoires rendues par la Cour internationale de justice dans les affaires* Breard (Paraguay c. Etats-Unis) *et* LaGrand (Allemagne c. Etats-Unis), Révue Belge de Droit International, 1998/2, Vol.XXXI, p.444 and p.447.

[406] Yearbook of the International Law Commission 1960 vol. I, p. 46 (para. 28).

> [a] code such as the Commission was preparing was an integrated whole and in its definition of the consular functions the human rights of a foreigner could not be ignored, for it was precisely one of the consul's functions to protect those rights of his nationals.[407]

341. During the 13th session of the International Law Commission in 1961, Mr. Edmonds, the U.S. member of the ILC, again called the right of a foreigner to communicate with the consulate of his or her home state "a very fundamental human right."[408]

342. Similarly, at the Diplomatic Conference that adopted the Vienna Convention on Consular Relations, the Korean Representative referred to "[t]he receiving State's obligation under paragraph (1)(b) [a]s extremely important because it relates to one of the fundamental and indispensable rights of the individual."[409] The Greek Representative noted that codification of the international law and customs on consular relations was consistent with the "present-day trend of promoting and protecting human rights, for which future generations would be grateful."[410] Finally, in the same context, the Spanish Delegate stated that: "the right of the nationals of a sending State to communicate with and have access to the consulate and consular officers of their own country... is one of the most sacred rights of foreign residents in a country."[411]

343. The *travaux préparatoires* confirm that States participating at the Diplomatic Conference that adopted the Vienna Convention were clear on the nature of the rights embodied in Article 36. The fact that the Vienna Convention is not in itself a human rights instrument is not

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[407] *Id.*, p. 50 (para. 23).

[408] Yearbook of the International Law Commission 1961, vol. I, p. 33 (para. 16).

[409] *See* Official Records, Vienna Convention on Consular Relations, U.N. Doc. No. A/Conf.25/16.

[410] *Id.*

[411] *Id.*

relevant and does not prevent that instrument from recognizing human rights.[412]

344. As previously shown, without the benefits flowing from the due process rights embodied in Article 36 of the Vienna Convention, the fifty-four Mexican nationals were subject to inherently flawed and unfair proceedings. The injury caused both to Mexico and to the fifty-four Mexican nationals admits of no doubt. As conclusively stated by the Inter-American Court of Human Rights, in criminal proceedings in which foreign nationals'

> most precious juridical rights, perhaps even their lives, hang in the balance [...] it is obvious that notification of one's right to contact the consular agent of one's country will considerably enhance one's chances of defending oneself and the proceedings conducted in the respective cases, including the police investigations, are more likely to be carried out in accord with the law and with respect for the dignity of the human person.[413]

345. Despite the international recognition of consular notification as an element of fundamental due process and a human right, the rights of Mexican nationals have been regularly violated – and continue to be violated – by the authorities of the United States. Stripped of this right, these foreign nationals have been subjected to criminal proceedings

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[412] Article 5.2 of the International Covenant on Civil and Political Rights recognizes that not all civil and political rights are spelled out in its provisions. Other scholars have affirmed that "individual rights need not necessarily derive from classical human rights treaties." *See* C. Tams, Consular Assistance and Rights and Remedies:Comments on the ICJ's Judgement in the LaGrand Case, 13 *European Journal of International Law* (2002) at p. 1257. Monica Feria Tinta, has also acknowledged that, "The relevance of human rights norms is evident today in areas as varied as immunities or the law of the sea." *See* M. Tinta, Due Process and the Right to Life in the Context of the Vienna Convention on Consular Relations: Arguing the LaGrand Case, 12 *European Journal of International Law* (2001) at p.10. This trend has been characterized by Judge Antonio Cançado Trindade as the *humanization* of international law. *See Advisory Opinion OC-16*, concurring opinion, para 35.

[413] *Advisory Opinion OC-16*, para. 121.

without the fairness and dignity to which each person is entitled.[414] Consequently, the integrity of these proceedings has been hopelessly undermined, their outcomes rendered irrevocably unjust.

[414] *Id.*

VI.

MEXICO IS ENTITLED TO FULL REPARATIONS FOR THE UNITED STATES'S VIOLATIONS OF THE VIENNA CONVENTION

346. In *LaGrand*, this Court had the opportunity to provide a definitive interpretation of the rights of the sending State and its nationals and the corresponding obligations of the receiving State under Article 36 of the Vienna Convention.

347. The Court, however, did not have the same opportunity with respect to remedies, for the simple reason that the German nationals who were the subject of that case had been executed at the time the Court rendered its judgment. For that reason, Germany did not seek the primary international law remedy of *resitutio in integrum*.[415]

348. In this case, by contrast, the Mexican nationals who prompted Mexico's filing, though under sentence of death in various constituent jurisdictions of the United States, remain alive. This case, therefore, will require the Court to consider, in a fundamentally different posture than *LaGrand*, the remedies to which Mexico is entitled. Specifically, this case will give the Court the opportunity to elaborate on its rulings in *LaGrand* by bringing fully to bear its authority to issue authoritative declarations of legal right, to order *restitutio in integrum*, and to direct

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[415] Even in that posture, however, the Court granted Germany substantial relief, *first*, in declaring that, in failing to notify Karl and Walter LaGrand without delay of their consular notification rights, the United States had breached its obligations under Article 36(1) of the Convention; *Second*, in declaring that, by failing to permit review and reconsideration of the LaGrands' convictions and sentences that took account of the Article 36(1) violations, the United States had breached its obligation under Article 36(2) to give full effect to the purposes of Article 36; And *finally*, by holding, in response to Germany's request for assurances of non-repetition, that should any German national be sentenced to a severe penalty in a proceeding that violated Article 36, the United States would have the obligation to permit review and reconsideration that took account of that violation. *LaGrand*, paras. 128(3), (4), (7).

that illegal conduct cease and that guarantees of non-repetition of the illegal conduct be provided.

349. But just as the Vienna Convention violations in this case are clear, so, too, are the remedies that flow from those violations.[416] Under general international law, Mexico is entitled to reparations from the United States for its violations of Article 36 of the Vienna Convention. The Vienna Convention itself need not provide for any specific form of remedy, because Mexico's remedial rights ensue from secondary rules of State Responsibility. As the United States explained in *United States Diplomatic and Consular Staff in Tehran*:

> It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation, therefore, is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the Convention itself.[417]

350. Mexico seeks full reparations under general international law for the U.S. violations of Articles 36(1) and (2) of the Vienna Convention. The "essential principle" is that "reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had

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[416] "Where jurisdiction exists over a dispute on a particular matter, no separate basis for jurisdiction is required by the Court to consider the remedies a party has requested for a breach of the obligation." *LaGrand (Germany v. United States of America), Judgment of 27 June 2001, I.C.J. Reports 2001*, para. 48. *See also Factory at Chorzów, P.C.I.J., Series A, No. 9*, 22. The Court has jurisdiction under the Optional Protocol to decide the dispute relating to the interpretation and application of the Vienna Convention. *See infra* Chapter II. Hence, it also has jurisdiction to order the remedies that Mexico seeks.

[417] Memorial of the United States, *United States Diplomatic and Consular Staff in Tehran, I.C.J. Pleadings 1980*, p. 188, quoting *Factory at Chorzów, Jurisdiction, Judgment No. 8, 1927, P.C.I.J. Series A, No. 9; see also Factory at Chorzów, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17*, p.29; *Affaires des biens britanniques au Maroc espagnol (Sp.-Gr. Brit.), 1 May 1925*, 2 R.I.A.A. 615, 641.

not been committed."[418] Article 34 of the Articles on State Responsibility provides for reparation in "the form of restitution, compensation and satisfaction, either singly or in combination."[419]

351. In this proceeding, Mexico seeks only that relief that is essential to ensure that its nationals receive fair process in criminal proceedings in which their life is at stake. Mexico does not seek monetary compensation or any other form of remedy to redress any moral, psychological, and physical injuries suffered by its nationals by virtue of the denial of Article 36 rights in their capital criminal proceedings. Nor does Mexico seek a blanket pardon or any other form of relief that would prevent the United States from retrying the nationals in proceedings that conform with the requirements of Article 36.

352. To ensure that its nationals receive fair process in criminal proceedings in which their lives are at stake, Mexico seeks three forms of relief.

353. *First*, Mexico seeks declarations that the United States has violated its international legal obligations to Mexico, in its own right and in the exercise of its right of consular protection of its nationals.

354. *Second*, because declarations standing alone would not remedy the injury sustained by Mexico and its nationals,[420] Mexico seeks *restitutio in integrum*. In the circumstances here, *restitutio in integrum* requires that this Court order the United States to take all steps necessary to ensure that (1) the convictions and sentences of the fifty-four Mexican

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[418] *Factory at Chorzów, Merits, 1928, P.C.I.J., Ser. A, No. 17, p. 47.*

[419] As the ILC has observed, "[w]iping out all the consequences of the wrongful act may . . . require some or all forms of reparation to be provided, depending on the type and extent of the injury that has been caused." ILC Articles on State Responsibility, Commentary to Art. 34, para. 2.

[420] *See, e.g.*, D. Shelton, *Remedies in International Human Rights Law* (1999) p. 128 ("[d]eclaratory judgments may be useful where the act or omission imputed to the state is unlawful but where there is no material or objective injury suffered or it is not possible to prove the injury. In general, however, a declaration of wrongdoing is rarely sufficient to remedy the harm done to an individual, national or alien.").

nationals subject to this proceeding are vacated; (2) all evidence obtained in violation of Article 36 is excluded from any future criminal proceeding against those nationals; and (3) no municipal law bar is applied to prevent any of the Mexican nationals subject to this proceeding from obtaining relief from the Vienna Convention violations.[421] Such an order is necessary to restore the situation that existed prior to the commission of the internationally wrongful acts.

355. *Finally*, Mexico requests an order of cessation and guarantees of non-repetition in order to terminate the United States' ongoing violations of article 36 of the Vienna Convention and to prevent comparable violations in the future.

A. MEXICO IS ENTITLED TO A DECLARATION.

356. Mexico seeks declarations in its own right, as well as in the right of its nationals, as part of the reparations owed by United States for its unlawful conduct. The purpose of a declaratory judgment is to "ensure recognition of a situation at law, once and for all and with binding force as between the Parties, so that the legal position thus established cannot again be called in question in so far as the legal effects ensuing therefrom are concerned."[422] The declarations requested by Mexico, which are set forth in Mexico's Submissions below, are designed to state clearly and precisely the international legal obligations of the United States under the Vienna Convention, as well as the consequences that arise from those obligations. These declarations are an essential complement to the other remedies sought.

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[421] By "municipal law bars," Mexico is referring to the federal and state procedural default rules, the retroactivity doctrine from *Teague v. Lane*, and the lack of remedies at law. *See supra* Chapter III, Section C.1.

[422] Interpretation of Judgments, *Nos. 7 and 8 (Factory at Chorzów), P.C.I.J., Series A, No. 13*, p. 20.

B. MEXICO IS ENTITLED TO *RESTITUTIO IN INTEGRUM*.

1. *Restitutio in Integrum* Requires Re-establishment of the *Status Quo Ante*.

357. It is well-established that the primary form of reparation available to a State injured by an internationally wrongful act is *restitutio in integrum*.[423] Article 35 of the ILC Articles on State Responsibility provides that

> a State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed.

The ILC deliberately adopted a definition of *restitutio in integrum* that required the responsible State to "re-establish[] the *status quo ante*, *i.e.* the situation that existed prior to the occurrence of the wrongful act."[424] This definition is consistent with the holdings of this Court and other international courts.

358. In the case concerning the *Free Zones of Upper Savoy and the District of Gex*, the Permanent Court required that France "withdraw its customs line in accordance with the provisions of the said treaties and instruments; and that this regime must continue in force so long as it has not been modified by agreement between the Parties."[425] In his Preliminary Report to the International Law Commission, Professor

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[423] Commentary to Art. 35 of the Articles on State Responsibility, para 1.

[424] *Id.* at para. 2. The importance of returning to the situation pre-existing the commission of the internationally wrongful act has been recognized by other distinguished international jurists. *See, e.g.*, P. Guggenheim, 2 Traité de Droit International Public (1954), 68-69 ("Un des premiers principes appliqués est celui de la restitutio in integrum, de la remise en état."); Restatement (Third) of the Foreign Relations Law of the United States § 901, cmt. d (1987) ("Ordinarily, emphasis is on forms of redress that will undo the effect of the violation, such as restoration of the status quo ante, restitution, or specific performance of an undertaking.")

[425] *Free Zones of Upper Savoy and the District of Gex, PCIJ, Series A/B, No. 46, Judgment of 7 June 1932*, p. 96, at p. 172.

Arangio-Ruiz observed that, "[a]lthough the Court did not expressly qualify its decision as purporting a French obligation of *restitutio*, the withdrawal envisaged obviously implies, in addition to the cessation of a situation not in conformity with international law, that re-establishment of the *status quo ante* which is at least the main portion of the essential content of *restitutio*."[426]

359. The Central American Court also endorsed this view in holding that restitution required re-establishing the situation that existed prior to the conclusion of the Bryan-Chamorro Treaty. El Salvador complained that a concession for a naval base in the Gulf of Fonseca granted by Nicaragua in the Treaty violated El Salvador's rights of co-ownership. The Central American Court ordered the re-establishment of the *status quo ante* by imposing a duty on Nicaragua "to re-establish and maintain the legal status that existed prior to the Bryan-Chamorro Treaty between the litigant republics."[427]

360. The Inter-American Court for Human Rights, too, has invariably defined *restitutio in integrum* as "re-establishing the previous situation"[428] and as "restoring, insofar as possible, the situation as it was before the violations were committed."[429]

361. The ILC expressly rejected an alternative definition of *restitutio in integrum* that would have required the responsible State to establish the situation that *would have* existed had the wrongful act not occurred. As the ILC explained, that broader definition confuses the

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[426] *Preliminary Report on State Responsibility by Mr. Gaetano Arangio-Ruiz, Special Rapporteur*, UN Doc. A/CN.4/416 and Add.1 in ILC Yearbook, 1988, Vol. II, Part One, p. 26, para. 76.

[427] *Bryan-Chamorro Treaty Case (Nicaragua v. El Salvador)*, 11 Am J. Int'l L. 674 (1917) at 696.

[428] *See, e.g., Ivcher Bronstein Case, Judgment of 6 February 2001, Inter-Am. Ct. H.R. (Ser.C) No. 74 (2001)*, para. 178; *Constitutional Court Case (Aguirre Roca, Rey Terry and Revoredo Marsano vs. Peru), Judgment of January 31, 2001, Inter-Am. Ct. H.R. (Ser.C) No. 71 (2001)*, para. 119.

[429] *Ivcher Bronstein Case, Interpretation of the Judgment on the Merits of 4 September 2001, Inter-Am. Ct. H.R. (Ser.C) No. 84*, para. 21.

general concept of reparation with the specific remedy of restitution.[430] Whereas "reparation must, so far as possible, wipe out all the consequences of the illegal act and re-establish the situation that would, in all probability, have existed if that act had not been committed,"[431] *restitutio in integrum* is only one of various remedies of reparation that may be utilized to achieve that result.

362. In addition, the ILC recognized that the obligation to re-establish the *status quo ante* – as opposed to an obligation to establish the situation that would have existed if the act had not occurred – has "the advantage of focusing on the assessment of a factual situation and of not requiring a hypothetical inquiry into what the situation would have been if the wrongful act had not been committed."[432]

363. The United States is therefore obliged to take the necessary action to restore the *status quo ante* in respect of Mexico's nationals detained, tried, convicted and sentenced in violation of their internationally recognized rights.

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[430] Articles on State Responsibility, Commentary to Art. 35, para. 2 ("latter definition absorbs into the concept of restitution other elements of full reparation and tends to conflate restitution as a form of reparation and the underlying obligation of reparation itself").

[431] *Factory at Chórzow, Merits, 1928, P.C.I.J., Series A, No. 17*, p.47.

[432] Articles on State Responsibility, Commentary to Art. 35, para. 2. Indeed, the United States argued in *LaGrand* that the determination whether timely notification would have prevented the deaths of the LaGrand brothers "rest[s] on speculation" and is based on "suppositions." *LaGrand*, para. 72. Earlier, it had argued that it "would be unworkable for a court to attempt to determine reliably what a consular officer would have done and whether it would have made a difference. . . . Surely, governments did not intend that such questions become a matter of inquiry in the courts." *Vienna Convention on Consular Relations (Paraguay v. United States of America), CR 1998/7 (Brown)*, para. 2.18. *See also* Brief to the Supreme Court in *Breard v. Greene*, 1997 U.S. Briefs 1390, Annex 34, at 23 (argument of the U.S. Solicitor General before the Supreme Court) ("there is no workable way to determine whether consular notification would have made a difference at a defendant's trial, given the inviolability of consular archives and the privileges and immunities of consular officers").

2. To Re-Establish the *Status Quo Ante*, the United States Must Ensure the *Vacatur* of the Convictions and Sentences, Ensure the Exclusion of Evidence Illegally Obtained, and Prevent the Application of Municipal Law Bars.

a. Mexico Is Entitled To *Vacatur* of the Convictions and Sentences of Its Nationals.

364. To restore the *status quo ante*, the convictions and sentences of the fifty-four Mexican nationals subject to this proceeding must be vacated. Here, the injury consists of a criminal proceeding (1) in which fundamental due process protections in the form of guarantees of consular notification and assistance were denied, and (2) which resulted in a criminal conviction and death sentence. In these circumstances, restoration of the *status quo ante* requires relieving the person subjected to the unfair proceeding of the legal effects of the tainted conviction and sentence.[433] Only by vacating the convictions and sentences rendered illegitimate by virtue of the denial of fundamental procedural rights may the responsible State make it possible for the sending State and its national to exercise their rights in a new proceeding in which those rights are respected.[434]

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[433] The removal of the effects of the illegal act in the restoration of the *status quo ante* is inherent in returning to the situation that existed prior to the unlawful act. *See* O. Schachter, International Law in Theory and Practice, 178 *Hague Rec.* (V, 1982) p. 190 ("When a State is internationally responsible for a wrongful act, it is under an obligation to discontinue the act *and to prevent the continuing of the effects of the act.* It is also normally under a duty to restore the situation as it existed before the breach. This may require it to carry out actions which it failed to do in accordance with its international obligation.") (emphasis added).

[434] *Constitutional Court Case, Judgment of January 31, 2001, Inter-Am. Ct. H.R. (Ser.C) No. 71 (2001),* paras. 119-120 (finding that the due process violation required *restitutio in integrum* so that "the victims are ensured the enjoyment of their violated rights and freedoms.").

365. It is well-established that the restoration of the *status quo ante* may consist of the *vacatur* of a judicial decision.[435] In its Commentary to the Articles on State Responsibility, the ILC observed that *restitutio in integrum* may take the form of "the reversal of some judicial act" such as "the rescinding or reconsideration of an administrative or judicial measure unlawfully adopted in respect of the person or property of a foreigner."[436]

366. Restitution, therefore, requires annulment of the judgment of a national tribunal when that judgment results from proceedings conducted in violation of international law.[437] For example, in the *Martini* case,[438]

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[435] *See* Preliminary Report on State Responsibility by Mr. Gaetano Arangio-Ruiz, Special Rapporteur, UN Doc. A/CN.4/416 and Add.1 in ILC Yearbook, 1988, Vol. II, Part One, at para. 73, *citing* K. Nagy, The problem of reparation in international law, in Questions of International Law: Hungarian Perspectives, (H. Bokor-Szego, ed., vol. 3, p. 173, at 177-78) (maintaining that *restitutio in integrum* may mean "annulment of certain decisions, e.g. laws, the omission of which cannot be compensated by payment of money"); J. Personnaz, La reparation du prejudice en droit international public 77 (1939) (stating that juridical *restitutio* may "lead to the revocation, annulment or amendment of the act" and may imply "the annulment or amendment of the judgment"); Guiliano, Diritto internazionale 594 (2nd ed, 1983) (including in his description of *restitutio in integrum*, "[t]he repeal of a law enacted in violation of a rule of international law ... [and] the rescinding of an administrative or judicial measure unlawfully adopted in respect of the person or property of a foreigner..."). *See also Restatement of the Law (Third), The Foreign Relations Law of the United States* (1987), § 901, cmt. c (1987) ("The obligation of a state to terminate a violation of international law may include discontinuance, revocation, or cancellation of the act (whether legislative, administrative or judicial) that caused the violation").

[436] ILC, Report on the work of its fifty-third session (2001), Draft Articles on the Responsibility of States for Internationally Wrongful Acts, Commentary to Art. 35, para. 5.

[437] L. Reitzer, La Réparation comme Conséquence de l'Acte Illicite en Droit International 173 (1938) ("Restitution may consist in the annulment of the judgment of a national tribunal delivered in contradiction of international law."). *See also* P. Daillier, A. Pellet: Nguyen Quoc Dinh, Droit International Public, 5e ed. (1994), 768, ¶ 506 ("Si l'acte illicite est un acte juridique, la remise des choses en l'état consiste dans son annulation, indépendamment de sa nature, même s'il s'agit d'une décision de justice.").

the Italian-Venezuelan Commission examined the judicial proceedings before Venezuelan courts against the Martini company and annulled certain payment obligations imposed by the Venezuelan court, where the proceedings constituted "a patent injustice" and were thus in violation of international law. The tribunal held:

> En prononçant leur annulation, le Tribunal Arbitral souligne qu'un acte illicite a été commis et applique le principe que les conséquences de l'acte illicite doivent être effacées.[439]

367. For another example, in the case concerning *Appeal from a Judgment of the Hungaro/Czechoslovak Mixed Arbitral Tribunal (The Peter Pázmány University),* the Permanent Court ordered the Respondent to restore the immovable property claimed by the University "in the condition in which it was before the application of the measures in question." The Court also ordered that the restored property had to be "freed from any measure of transfer, compulsory administration or sequestration."[440] The Court therefore effectively annulled any decisions regarding the property at issue.

368. International human rights bodies have regularly found that a conviction tainted by a due process violation or another violation of an internationally recognized right cannot stand. In the *Castillo Petruzzi* case, for example, the claimants challenged actions of the Peruvian government involved in their trial for treason before military courts with "faceless" judges presiding. In holding that Peru had violated the defendants' due process rights, the Inter-American Court of Human Rights observed:

> Failure to fulfill the requirements of due process renders the proceedings invalid. With that, the judgment is automatically invalid, as it does not meet the requirements for it to stand and

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[438] *Affaire Martini*, RIAA, vol. II, p. 973 (1930).

[439] *Id.*, at p.1002.

[440] *Appeal from a Judgment of the Hungary/Czechoslovak Mixed Arbitral Tribunal (The Peter Pázmány University), 1933, P.C.I.J., Series A/B, No. 61,* 208, 249.

> have the effects that normally follow from an act of this nature. It is up to the State, then, within a reasonable time period, to order a new trial that *ab initio* satisfies the requirements of due process of law . . .[441]

The Court further stated that:

> If the proceedings upon which the judgment rests have serious defects that strip them of the efficacy they must have under normal circumstances, then the judgment will not stand. It will not have the necessary underpinning, which is litigation conducted by law. The concept of nullification of a proceeding is a familiar one. With it, certain acts are invalidated and any proceedings that followed the proceeding in which the violation that caused the invalidation occurred, are repeated. This, in turn, means that a new judgment is handed down. The legitimacy of the judgment rests upon the legitimacy of the process.[442]

369. The obligation to annul a tainted judgment entails the obligation to eradicate all the effects of the judgment. In the *Cantoral Benavides* case, the Court ordered Peru to

> nullify all judicial or administrative, criminal or police proceedings against Luis Alberto Cantoral Benavides in connection with the events of the present case and...expunge the corresponding records.[443]

370. Similarly, in the *Cesti Hurtado Case*,[444] a Peruvian national had been arrested, deprived of his liberty and sentenced under the

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[441] *Castillo Petruzzi et al. case, Judgment of 30 May 1999, Inter-Am. Ct. H.R. (Ser. C) No. 52 (1999),* para. *221.*

[442] *Id.*, para. 219.

[443] *Cantoral Benavides case, Reparations, Judgment of December 3, 2001, Inter-Am. Ct. H.R. (Ser. C) No. 88 (2001),* para. *78.*

[444] *Cesti Hurtado Case, Judgment of 29 September, 1999, Inter-Am. Ct. H.R. (Ser.C) No. 56 (1999).*

military justice system, despite a *habeas corpus* action ordering that the alleged victim should be separated from the proceedings under the military justice system and that his freedom should be respected.[445] Peru rejected the Commission's demands that the Court "should annul the whole proceeding against the victim by the Peruvian military tribunals as well as all the effects of the judgment that was pronounced in irregular proceedings."[446] Peru argued that the grant of such a request would "result in procedural chaos, destabilizing the system of laws of the Peruvian State" and that the annulment demand was "extravagant and constitutes an attack on the sovereignty of the Peruvian State."[447] Rejecting Peru's position, the Court held that the proceeding under the military justice system had deprived Mr. Cesti of due process rights, and it therefore ordered "that the State must annul this proceeding and all the effects derived from it."[448]

371. Unsurprisingly, authors examining the consequences of violations of the Vienna Convention in U.S. death penalty proceedings have advocated that *restitutio in integrum* consist of the *vacatur* of the convictions and sentences. Professor Kadish, for example, explains that

> full effect cannot be given to the Article [36] once a foreign national has been convicted in violation of its provision unless a new trial is granted. A correct remedy necessarily demands a new trial in which the foreign national has full access to the cultural bridge envisioned by the world delegates of the Vienna Convention.[449]

372. Professor Quigley observes that

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[445] *Id.*, para. 3.

[446] *Id.*, para. 190 (internal quotations omitted).

[447] *Id.*, para. 191 (internal quotations omitted).

[448] *Id.*, para.194.

[449] M. Kadish, Article 36 of the Vienna Convention on Consular Relations: A Search for the Right to Consul, 18 *Michigan Journal of International Law* (1997) at 610-611.

> in the face of a failure to notify, a conviction must be reversed. This is a straightforward application of the requirement, in the law of state responsibility, of restoring the *status quo* before a violation.[450]

373. *Vacatur* of the conviction and sentences of the fifty-four Mexican nationals is essential to *restitutio in integrum* here because it is literally the only way to restore the *status quo ante* the internationally wrongful act.[451] Only by relieving these nationals of the legal effect of their tainted convictions and sentences will this Court ensure the restoration of a situation in which a fair proceeding may go forward.

b. Mexico Is Entitled in Any Future Criminal Proceedings Against Its Nationals to the Exclusion of Evidence Obtained in Breach of Article 36.

374. As an aspect of *restitutio in integrum*, Mexico is also entitled to an order that in any subsequent criminal proceedings against the

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[450] J. Quigley, LaGrand: A Challenge to the U.S. Judiciary, 27 *Yale Journal of International Law* (2002) at 437.

[451] Professor Mann, for example, writes:

> Obviously the problem arises only where it is a juristic act such as legislation, an executive order or a judicial decision that is alleged to be tortious. In such cases it may happen that nullity, and possibly a judicial declaration of nullity is the only effective method or at least the necessary concomitant of an effective method for the protection of a victim State.

F.A. Mann, The Consequences of an International Wrong in International and National Law, 48 *Brit. YB Int'l L.* (1976-1977) at p. 6. Mann then cites with approval the view of Sir Hersch Lauterpacht that "the absence of more direct means of enforcement tends to endow the principle of nullity of illegal acts with particular importance in the international sphere." *Id. (citing* H. Lauterpacht, Recognition in International Law 421 (1947)). *See also* I. Brownlie, *State Responsibility* (1983), p. 210 ("to achieve the object of reparation tribunals may give 'legal restitution' in the form of a declaration that . . . the relevant act of the executive, legislature or judicial organs of the respondent state, is a nullity in international law").

nationals, statements and confessions obtained prior to notification to the national of his right to consular assistance be excluded. The exclusion of this evidence in these circumstances would comport with the exclusionary rule, a general principle of law under Article 38(1)(c) of the Court's Statute.

375. The exclusionary rule applies in both common law and civil law jurisdictions and requires the exclusion of evidence that is obtained in a manner that violates due process obligations. For example, under United States law, evidence obtained in violation of basic due process rights must be excluded from use at trial against the defendant.[452] In the United Kingdom and Canada, confessions obtained in violation of domestic law, including applicable human rights obligations, are excluded as a matter of law so as not to jeopardize the fairness and justice of the proceedings.[453] Indeed, courts in the United Kingdom have specifically excluded confessions obtained by the police in procedures tainted by a violation of the foreign national's consular rights.[454]

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[452] *See supra* Chapter III.

[453] For the United Kingdom, section 76 of the Police and Criminal Evidence Act of 1984 mandates the exclusion of confessions that are obtained in violation of United Kingdom law, consistently with the European Convention on Human Rights. *See Re Arrows* (No. 4), *Hamilton v. Naviede* [1994] 3 All ER 814, 821. *See also* D. Feldman, Regulating Treatment of Suspects in Police Stations: Judicial Interpretation of Detention Provisions in the Police and Criminal Evidence Act 1984, *Criminal Law Review* (1990) p. 463.

For Canada, the 1982 Constitution's Charter of Rights and Freedoms, Section 24(2) declares that "where...a court finds that evidence was obtained in a manner that infringed or denied any of the rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute." The Canadian Supreme Court has found that §24(2) "does not confer a discretion on the [trial] judge but a duty to admit or exclude as result of his finding [of a disrepute.]" *The Queen v. Collins*, 33 C.C.C.(3d) 1, 13 (1987).

[454] *R. v. Bassil and Mouffareg* (1990) 28 July, Acton Crown Court, HHJ Sich. Reported in *Legal Action* 23, December 1990.

376. Civil law jurisdictions have also recognized the important role of the exclusionary rule. For example, Germany,[455] France,[456] and Italy[457] all require courts to exclude evidence, particularly confessions, when obtained in violation of basic principles of due process. Likewise, the Japanese Constitution and Code of Criminal Procedure provide explicit legal provisions regarding the application of the exclusionary rule to confessions.[458] Article 206 of the Mexican Federal Code of Criminal Procedure likewise contains a general exclusionary rule by providing that evidence obtained in violation of the applicable law is inadmissible.[459]

377. The preponderant use of the exclusionary rule in domestic law proceedings has led to its recognition in the procedural rules of

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[455] *See, e.g.*, section 136 German Strafprozessordnung. In addition, German courts have found that confessions obtained in violation of the accused's rights under the Strafprozessordnung, such as the rights to counsel or silence, also must be excluded. *See, e.g.*, BGH Judgment 27 February 1992 in 22 NJW 1463 (1992)(citing United States, British, Danish, Dutch and Italian precedent to mandate exclusion of confessions garnered in absence of police warnings as to accused's rights to counsel or silence).

[456] *See* articles 170(1), 170(2) and 59(3) of the French Code de Procédure Pénale.

[457] Italian law categorically bars confessions from trial unless the confession is given in the attorney's presence. *See, e.g.*, Decision of the Constitutional Court of May 23, 1991, 259 Gazz. Uff. Article 191(1) of the Italian Criminal Procedure Code of 1989, Codice di Procedura Penale, expressly provides that "[e]vidence acquired in violation of prohibitions established by law cannot be used [in court]."

[458] *See* Kenpo [The Constitution of Japan], Article 38(2); Keisoho [The Code of Criminal Procedure], Law No. 131 of 1948, Article 319(1).

[459] Under Article 20 of the Mexican Constitution, Article 287, section II, of the Federal Code of Criminal Procedure and Article 249, section IV, of the Federal District Code of Criminal Procedure, a confession obtained from a criminal defendant is not admissible against that defendant unless the confession was taken in front of the Ministerio Público or judge and in the presence of counsel to the defendant. Article 287 expressly excludes confessions obtained by the judicial police.

international criminal bodies. Thus, Rule 95 of the International Criminal Tribunal for the Former Yugoslavia is entitled "exclusion of certain evidence" and provides that "[n]o evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings."[460] Like the other provisions of the ICTY's Rules of Evidence, this rule reflects a "concept[. . .] generally recognized as being fair and just in the international arena."[461]

378. The affirmation of this general principle of law is further evident in Article 69(VII) of the Rome Statute of the International Criminal Court, which rules out evidence obtained by means of a violation of the procedural due process guarantees of the Statute or of internationally recognized human rights where the violation (a) casts substantial doubt on the reliability of the evidence, or (b) if the admission would seriously damage the integrity of the proceedings.[462] The protection is a broad one intended to exclude any evidence that is obtained by means of a serious violation of due process or other human rights that would endanger the integrity of the proceedings.[463]

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[460] International Criminal Tribunal for the Former Yugoslavia, Rules of Procedure and Evidence, UN Doc. IT/32/rev. 12 (1996), entered into force 14 March 1994, amendments adopted 8 January 1996. Rule 95 works in tandem with rule 89(D), which empowers trial judges with the ability to exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial. *See, e.g., Prosecutor v. Tadic*, Decision on the Defense Motion on Hearsay, ICTY Case No. IT-94-1-T, 5 Aug. 1996, para. 18. *See also* R. May & M. Wierda, International Criminal Evidence (2002), 295, para. 8.84 ("The most obvious remedy for the infringement of the fair trial rights of the accused is the exclusion of any evidence obtained as a result of the infringement.").

[461] 1994 Annual Report, U.N. Docs A/49/342, S/1994/1007, paras. 52-54.

[462] *Rome Statute of the International Criminal Court*, 37 International Legal Materials 999 (1998), Art. 69 (VII).

[463] *See* C. Safferling, *Towards an International Criminal Procedure*, (2001) p. 296; H.J. Behrens, Investigation, Trial and Appeal in the International Criminal Court Statute, *6 Eur.J.Crime Cr.L.Cr.J.* (1998) p. 120 ("[A]lmost all imaginable cases of violations of human rights" will make evidence inadmissible."); D.

379. In light of the due process aspect inherent in the application of the exclusionary rule, international human rights treaties have provided for the application of the exclusionary rule. Article 15 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, for example, provides that "any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made." Similarly, Article 8(3) of the American Convention of Human Rights[464] establishes the exclusionary rule of evidence as part of the right to a fair trial by expressly declaring that "[a] confession of guilt by the accused shall be valid only if it is made without coercion of any kind." The Inter-American Commission for Human Rights has acted consistently with this principle in its findings.[465]

380. The status of the exclusionary rule as a general principle of law permits the Court to order that the United States is obligated to apply this principle in respect of statements and confessions given to United States law enforcement officials prior to the accused Mexican nationals being advised of their consular rights in any subsequent criminal proceedings against them.

c. Mexico Is Entitled To an Order Prohibiting Application of Municipal Law Bars.

381. To restore the *status quo ante*, and to ensure that full effect is given the purposes for which the Article 36 rights were intended, the Court should also prohibit the United States from applying any procedural penalty for a Mexican national's failure timely to raise a claim or defense based on the Vienna Convention – in the form of any state or federal doctrine of procedural default, bar of retroactivity, or

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Piragoff, *Commentary on the Rome Statute,* in Trifterer (ed.), Art. 69, Nos. 76-80 (1999).

[464] Adopted at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, 22 November 1969.

[465] *See, e.g., Garcia v. Peru, Report No. 1/95, Case 11.006, Inter-Am. Cm. H.R. 71, OEA/Ser.L/V/II.88, Doc. 9 rev. (1995),* at 103.

similar rule preventing a United States court from reaching the merits of the claim or defense – where competent authorities of the United States have breached their obligation to advise the national of his or her rights under the Vienna Convention.[466]

382. Without such a prohibition, these procedural penalties would have the effect of frustrating any attempt by the national to assert the Vienna Convention rights that Mexico seeks to vindicate here. Indeed, in *LaGrand*, even in a remedial posture that did not implicate *restitutio*, the Court has already held that the United States has an obligation to allow review and reconsideration of convictions and sentences that takes account of Vienna Convention claims.[467]

383. Equally, the Court should prohibit the United States from applying any municipal law doctrine or judicial holding that prevents a court in the United States from providing a remedy, including the relief to which this Court holds that Mexico is entitled here, to a Mexican national whose Article 36 rights have been violated.[468] Only in that manner would Mexico and its national be restored, in any subsequent criminal proceedings against the national, to a situation in which their Article 36 rights might be respected.

384. Finally, the Court should prohibit the United States from applying any municipal law doctrine or judicial holding that requires an individualized showing of prejudice as a prerequisite to relief for the Vienna Convention violations shown here.[469] As Mexico has demonstrated,[470] consular notification and assistance are fundamental due process rights whose deprivation renders a criminal proceeding – and, in particular, a criminal proceeding in which the death penalty is sought – fundamentally unfair. In these circumstances, too, placing the burden of

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[466] *See* Chapter IV.B.2.

[467] *LaGrand*, para. 128(4) and para. 128(7).

[468] *See* Chapter IV.B.2.

[469] *See supra* Chapter III.C.3.

[470] *See supra* Chapter V.

showing prejudice on the victim of the violations would deny to Mexico and its nationals the full effect of the Article 36 provisions. Hence, to restore the *status quo ante* in which these rights may be fully exercised, the Court should preclude any such requirement.

3. The Re-establishment of the *Status Quo Ante* Is Not Materially Impossible and Is Proportionate to the Injury Caused.

385. Article 35 of the Articles on State Responsibility provides for restitution "provided and to the extent that" restitution neither is "materially impossible" nor involves a "burden out of all proportion to the benefit deriving from restitution instead of compensation." Neither of these provisos applies here.

a. Re-establishment of the *Status Quo Ante* Is Possible.

386. Restitution would be materially impossible here only if the Mexican nationals subject to this proceeding had been executed.[471] It is evident that it is not materially impossible for the United States to provide for *vacatur* of the convictions and sentences, the exclusion from any future criminal proceedings of evidence illegally obtained, and the prohibition of municipal law bars to hearing Vienna Convention claims on their merits and providing effective relief for those claims.

387. The United States may not adduce inconvenience or impracticability to avoid *restitutio in integrum*. As the ILC noted in its Commentary to Article 35:

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[471] By their Applications, both Paraguay and Germany sought restitution in *Vienna Convention on Consular Relations* and *LaGrand*, respectively. *Vienna Convention on Consular Relations (Paraguay v. United States of America), Application of the Republic of Paraguay*, para. 25; *LaGrand (Germany v. United States of America), Application of Germany*, para. 15. However, in each instance, the nationals of these States were executed shortly after the filing of the Applications. Paraguay did not continue its case to the merits; Germany no longer sought restitution during the merits phase of *LaGrand*.

> restitution is not impossible merely on grounds of legal or practical difficulties, even though the responsible State may have to make special efforts to overcome these.[472]

388. As a matter of fundamental principles of international law, the United States also may not rely on its federal system or its internal law to avoid its obligation to make full reparations on the grounds of material impossibility.[473] In any event, in this proceeding, it is uncontested that as a matter of its own internal law, the United States is fully capable of implementing any judgment this Court may render.[474]

b. No Burden Out of Proportion to the Benefit Deriving from Restitution Instead of Compensation.

389. Restitution would not impose a disproportionate burden on the United States. The only "burden" that restitution would impose on the United States here would be the need to conduct new trials and sentencing proceedings in the cases subject to this proceeding, so that in

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[472] Commentary to Art. 35 of the Articles on State Responsibility, para. 8.

[473] *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory, Advisory Opinion, 1932, P.C.I.J., Series A/B, No. 44*, p. 4. ("a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force"). *See also Free Zones of Upper Savoy and the District of Gex, Free Zones of Upper Savoy and the District of Gex, Judgment, 1932, P.C.I.J., Series A/B, No. 46*, p. 167; *Greco-Bulgarian "Communities", Advisory Opinion, 1930, P.C.I.J., Series B, No. 17*, p.32; *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion of 11 April 1949, I.C.J. Reports 1949*, p. 180; *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion of 29 April 1999, I.C.J. Reports 1999*, para. 62.

[474] *Avena and Other Mexican Nationals (Mexico v. United States of America), Request for the Indication of Provisional Measures of Protection Submitted by the Government of the United Mexican States*, paras. 22-29 (setting out the means available to the United States to ensure compliance with the Court orders); *Oral Proceedings*, CR 2003/2 (Thessin), para. 3.43 ("we will not debate with Mexico the legal principles involved in implementing United States international law obligations").

those proceedings the United States could conform to its obligations under the Vienna Convention, a treaty to which it has been a party for over thirty years. All criminal justice systems, and certainly that of the United States, provide for retrial and resentencing in cases in which the original proceedings have been flawed, and the Court would therefore impose no novel requirement by ordering restitution in the form of *vacatur*. Likewise, United States courts are well accustomed to excluding evidence illegally obtained, and an order not to apply municipal law bars would equate simply to an order to determine cases on their merits. In other words, restitution would impose no burden here at all.[475]

390. By contrast to the simple requirements to be imposed on the United States in restoring the *status quo ante*, the injury to be suffered by Mexico's nationals without the requirement to make restitution is the greatest of all: the loss of life. The injury suffered by Mexico is equally grave as it involves the ongoing denial of Mexico's international law rights: the abrogation of *pacta sunt servanda*. There is no comparison between the burden that would be imposed on Mexico by a denial of restitution and that which the United States would bear on a grant, let alone a disproportionate burden in the United States's favor.

C. THE UNITED STATES MUST CEASE ITS UNLAWFUL CONDUCT AND OFFER MEXICO GUARANTEES OF NON-REPETITION

391. In addition to the reparations sought in relation to Mexico's own rights and those of its nationals on death row, Mexico seeks orders from this Court that the United States (1) cease its violations of Article 36 in respect of Mexico and its nationals, and (2) provide Mexico with guarantees of non-repetition of the illegal acts described in this

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[475] Any balancing permitted between compensation and restitution must be based on considerations of equity and reasonableness, "with a preference for the position of the injured State in any case where the balancing process does not indicate a clear preference for compensation as compared with restitution." Article 35(b) of the Articles on State Responsibility. Mexico does not seek compensation here, and no such balancing would be possible, because compensation could not vindicate in any way the rights of the fifty-four Mexican nationals to consular notification and assistance in a proceeding at which their life and liberty are at stake.

Memorial. Cessation and guarantees are well-established remedies under international law, as they "are aspects of the restoration and repair of the legal relationship affected by the breach."[476]

1. The United States Has Regularly Violated and Continues Regularly to Violate Mexico's Article 36 Rights and Those of Its Nationals.

392. In *LaGrand*, by its fourth submission, Germany sought assurances of non-repetition.[477] Addressing Germany's request for general assurances, the Court took note of the information provided by the United States of its efforts to raise awareness of consular protection rights through the distribution of pamphlets and pocketcards and by the conduct of training programs.[478] The Court held:

> If a State, in proceedings before this Court, repeatedly refers to substantial activities which it is carrying out in order to achieve compliance with certain obligations under a treaty, then this expresses a commitment to follow through with the efforts in this regard. * * * * The Court considers that the commitment expressed by the United States to ensure implementation of the specific measures adopted in performance of its obligations under Article 36, paragraph 1 *(b)*, must be regarded as meeting Germany's request for a general assurance of non-repetition.[479]

The United States again referred to this program during the provisional measures phase of this proceeding.[480]

393. Regrettably, however, the United States program, whatever its components, has proven ineffective to prevent the regular and continuing

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[476] Commentary to Art. 30 of the Draft Articles on State Responsibility, para. 1.

[477] *LaGrand*, paras. 117-127.

[478] *LaGrand*, paras. 121, 123 and 124.

[479] *Id.*

[480] CR 2003/2 (Lauterpacht), para. 4.17; CR 2003/4 (Brown), at 10-11.

violation by its competent authorities of consular notification and assistance rights guaranteed by Article 36.

394. *First*, competent authorities of the United States regularly fail to provide the timely notification required by Article 36(1)(b) and thereby to frustrate the communication and access contemplated by Article 36(1)(a) and the assistance contemplated by Article 36(1)(c).[481] These violations continue notwithstanding the Court's judgment in *LaGrand* and the program described there.[482]

395. The facts of the fifty-four cases detailed by Mexico in this proceeding makes clear the historic noncompliance by the United States with its Article 36 obligations.[483] The first arrest of the Mexican nationals subject to this Application occurred on 3 March 1979, and the most recent was 4 January 1999.

396. Mexico has demonstrated, moreover, that the pattern of regular noncompliance continues. During the first half of 2003, Mexico has identified at least one hundred cases in which Mexican nationals have been arrested by competent authorities of the United States for serious felonies but not timely notified of their consular notification rights.[484] The actual number is almost certainly far larger, because these cases

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[481] *See supra* Chapter IV.A. The United States' "self-described practice of 'investigating reports of violations and apologizing to foreign governments, and working with domestic law enforcement to prevent further violations,'" remains, in the words of one United States federal judge, "equivalent to securing enforcement by a toothless, clawless lion." *United States v. Lombera-Camorlinga*, 206 F.3d 882, 888 (9th Cir. 1999) (Boochever, J., dissenting).

[482] *See supra* Chapter III.E. (referring to the comprehensive survey undertaken by the Mexican Foreign Ministry in respect of its 45 consulates in the United States); Declaration of Ambassador Roberto Rodríguez Hernández, Exhibit B (detailing cases).

[483] *See Avena and Other Mexican Nationals (Mexico v. United States of America), Application of Mexico*, paras. 67-267, and Declaration of Roberto Rodríguez Hernández, Exhibit A (detailing cases) , Annex 7.

[484] *See* Declaration of Ambassador Roberto Rodríguez Hernández, Exhibit B (detailing cases) , Annex 7.

suggest, by the very nature of the violation, that there must be many others of which Mexican consulates remain unaware.

397. *Second*, courts in the United States continue to apply doctrines of procedural default and non-retroactivity that prevent those courts from reaching the merits of Vienna Convention claims, and those courts that have addressed the merits of those claims (because no procedural bar applies) have repeatedly held that no remedy is available for a breach of the obligations of Article 36.[485] Of course, the United States' education and training program described in *LaGrand*,[486] even if fully effective on its own terms, could have no effect whatsoever on these legal rules and doctrines. Likewise, the United States' reliance on clemency proceedings to meet *LaGrand*'s requirement of review and reconsideration represents a deliberate decision to allow these legal rules and doctrines to continue to have their inevitable effect.[487] Hence, the United States continues to breach Article 36(2) by failing to give full effect to the purposes for which the rights accorded under Article 36 are intended.

2. Mexico Is Entitled to Cessation and Guarantees of Non-Repetition.

398. Article 30 of the ILC Articles on State Responsibility provides that States are to cease wrongful conduct and offer guarantees of non-repetition where the circumstances so require. Such orders are appropriate here.

399. *First*, the restoration of Mexico's legal relationship with the United States under the Vienna Convention necessarily requires the United States to cease its ongoing violations of that treaty. The requirement of cessation represents a fundamental concern for compliance with international obligations and for upholding the rule of law.[488] In seeking an order from this Court that the United States timely

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[485] *See supra* Chapter III.C.

[486] *LaGrand*, paras. 121, 123 and 124.

[487] *See supra* Chapter IV.B.4.

[488] The International Law Commission thus explains: "The responsible State's obligation of cessation thus protects both the interests of the injured State or

notify Mexican nationals of their consular rights and give full effect to this obligation in its domestic law, Mexico does nothing more than ask the Court to uphold the fundamental tenet of *pacta sunt servanda*.

400. The Tribunal in the *Rainbow Warrior Arbitration* identified "two essential conditions intimately linked" for the requirement of cessation to arise, "namely that the wrongful act has a continuing character and that the violated rule is still in force at the time in which the order is issued."[489] There is no question here that the obligations of the Vienna Convention have been and remain in force between the parties, and the wrongful conduct in this case indisputably has a continuing character.

401. As to Article 36(1), the pattern of noncompliance is pronounced and has extended for a lengthy period. In any event, cessation "encompasses situations where a State has violated an obligation on a series of occasions, implying the possibility of further repetitions."[490]

402. As to Article 36(2), there is no dispute that the municipal law rules and doctrines that have repeatedly prevented the United States from giving full effect to the purposes of Article 36 remain in full force and effect. Maintaining these domestic impediments continues the internationally wrongful act.[491]

403. *Second*, the United States must not only cease its current wrongful conduct, but it must also take steps to prevent future violations

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States and the interests of the international community as a whole in the preservation of, and reliance on, the rule of law." Commentary to Art. 30 of the Articles on State Responsibility, para. 5.

[489] *Rainbow Warrior, UNRIAA*, vol. XX, p. 217 (1990), at p.270, para. 114.

[490] Commentary to Art. 30 of the Articles on State Responsibility, para. 3

[491] Ago, in his fifth report as Special Rapporteur to the ILC, provided examples of wrongful continuing acts, including "the act of maintaining in force a law which the State is internationally required to repeal, or conversely, the act of not passing a law that is internationally required." ILC Yearbook (1976), vol. II (Part One), p. 22, document A/CN.4/291 and Add. 1 and 2, para. 62.

of the same kind. Guarantees of non-repetition are sought as a preventive measure so that future violations of the same type will not occur again,[492] especially in the face of a pattern of international law violations.[493] This Court did not question whether assurances could be granted in *LaGrand*, but moved directly into a consideration of what assurances should be afforded in order to prevent recurrent violations of Articles 36(1) and (2) by the United States.

404. As Mexico has demonstrated, the Court can no longer accept as adequate the assurances provided in *LaGrand*. When considering a guarantee of non-repetition, "[t]he measures envisaged may involve formal assurances from the wrongdoing state, instructions to government agents, or adoption of certain conduct considered preventive in nature."[494] Here, an apology or simple verbal assurance of non-repetition would not suffice.[495] Mexico recognizes that the United States cannot guarantee that no future violations of Article 36 will ever occur.[496] But international law requires that the United States take concrete steps designed to ensure that it will achieve regular compliance with its Article

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[492] Commentary to Art. 30 of the Articles on State Responsibility, para. 1.

[493] For example, the U.S. Secretary of State notified Spain of its demand to prevent unlawful visitation and search of United States' merchant vessels by Spanish armed cruisers. Letter of Secretary of State Evarts to the Minister to Spain, Mr. Fairchild, of 11 Aug. 1880, in: J. Moore (ed.), *A Digest of International Law* (1906), vol. 2, pp. 907 (seeking "a distinct assurance against their repetition"). The Human Rights Committee has frequently called on States party to the ICCPR to take steps to ensure that similar violations will not occur in the future and that those States are under an obligation to take immediate steps to ensure strict observance of the obligations set out in the Covenant. *See* D. Shelton, *Remedies in International Human Rights Law* (1999) p. 143.

[494] D. Shelton, *Remedies in International Human Rights Law* (1999) p.102 (discussing reparations for injuries to aliens under the rules of State Responsibility).

[495] As the ILC notes, "Assurances are normally given verbally, while guarantees of non-repetition involve something more." Commentary to Art. 30 of the Draft Articles on State Responsibility, para. 12.

[496] *LaGrand*, para. 124.

36 obligations. Requests for specific steps or for specific instructions are commonly granted in international law,[497] and are clearly required in this case.

405. Accordingly, Mexico is entitled to an order requiring that the United States take all legislative, executive, and judicial steps necessary to (1) ensure that the regular and continuing violations of the Article 36 consular notification, access, and assistance rights of Mexico and its nationals cease, and (2) guarantee that its competent authorities, of federal, state, and local jurisdiction, maintain regular and routine compliance with their Article 36 obligations.

406. In addition, Mexico is entitled to an order that the United States take all legislative, executive, and judicial steps necessary to ensure that its judicial authorities cease applying, and guarantee that in the future they will not apply, (1) any procedural penalty for a Mexican national's failure timely to raise a claim or defense based on the Vienna

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[497] *See, e.g., Trail Smelter (United States / Canada)*, III U.N.R.I.A.A. 1905, 1934 (1938, 1941); Martens, *Nouveau Recueil*, 2nd series, vol. XXIX, pp. 456, 486 (describing the need for the United Kingdom to issue "instruction to the British Naval Commanders to molest no German merchantmen in places not in the vicinity of the seat of war" following the seizure of two German ships by the British Navy during the Boer war). García-Amador cited the following examples of the United States providing specific assurances of non-repetition:

> After the lynching of Italian citizens in Tallulah, President McKinley repeatedly asked Congress to 'confer upon the federal courts jurisdiction in this class of international cases where the ultimate responsibility of the Federal Government may be involved.' Similarly, in connection with the *Japanese schools* incident (1906), President Roosevelt requested Congress to amend the criminal and civil law of the United States to enable the Executive to protect the rights of aliens in conformity with the provisions of international agreements. Previously, in connection with the case of *McLeod*, who had been arrested in New York state for murder during the destruction of the *Carolina* (1840), it has been held that the federal authorities were not competent to deal with the British Government's claim. In order to prevent any recurrence of that difficulty, Congress amended the Habeas Corpus Act in 1842.

F.V. García-Amador, *The Changing Law of International Claims*, Vol. II, (1984), at pp. 587-88 (emphasis in original, footnotes omitted).

Convention – in the form of any state or federal doctrine of procedural default, bar of retroactivity, or similar rule preventing a United States court from reaching the merits of the claim or defense – where competent authorities of the United States have breached their obligation to advise the national of his or her rights under the Convention; (2) any municipal law doctrine or judicial holding that prevents a court in the United States from providing a remedy, including the relief to which this Court holds that Mexico is entitled here, to a Mexican national whose Article 36 rights have been violated; and (3) any municipal law doctrine or judicial holding that requires an individualized showing of prejudice as a prerequisite to relief for the Vienna Convention violations shown here.

VII.

SUBMISSIONS

407. FOR THESE REASONS, the submissions of the Government of Mexico respectfully requests the Court to adjudge and declare

(1) that the United States, in arresting, detaining, trying, convicting, and sentencing the fifty-four Mexican nationals on death row described in Mexico's Application and this Memorial, violated its international legal obligations to Mexico, in its own right and in the exercise of its right of diplomatic protection of its nationals, as provided by Article 36 of the Vienna Convention;

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

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

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

power's functions are international or internal in character;

and that, pursuant to the foregoing international legal obligations,

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

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

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

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

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

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

(f) preventing the application of any municipal law doctrine or judicial holding that requires an

individualized showing of prejudice as a prerequisite to relief for the violations of Article 36;

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

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

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

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

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

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

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

408. Mexico reserves the right to modify or extend the terms of its requested judgment, as well as the grounds invoked in this Memorial.

New York, 18 June 2003

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Annexes to the Memorial of Mexico

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