INTERNATIONAL COURT OF JUSTICE

Peace Palace, Carnegieplein 2, 2517 KJ The Hague, Netherlands
Tel.: +31 (0)70 302 2323 Fax: +31 (0)70 364 9928
Website: www.icj-cij.org

Summary
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Case concerning Avena and other Mexican Nationals (Mexico v. United States of America)

Summary of the Judgment of 31 March 2004

History of the proceedings and submissions of the Parties (paras. 1-14)

The Court begins by recalling that on 9 January 2003 the United Mexican States (hereinafter referred to as "Mexico") instituted proceedings against the United States of America (hereinafter referred to as the "United States") for "violations of the Vienna Convention on Consular Relations" of 24 April 1963 (hereinafter referred to as the "Vienna Convention") allegedly committed by the United States.

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

On the same day, Mexico also filed a request for the indication of provisional measures.

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

"(a) The United States of America shall take all measures necessary to ensure that Mr. César Roberto Fierro Reyna, Mr. Roberto Moreno Ramos and Mr. Osvaldo Torres Aguilera are not executed pending final judgment in these proceedings;

(b) The Government of the United States of America shall inform the Court of all measures taken in implementation of this Order."

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

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

The Court further recalled that, in order to ensure the procedural equality of the Parties, it had decided not to authorize a requested amendment by Mexico of its submissions so as to include two additional Mexican nationals, while taking note that the United States had made no objection to the withdrawal by Mexico of its request for relief in two other cases.

Since the Court included upon the Bench no judge of Mexican nationality, Mexico chose Mr. Bernardo Sepúlveda to sit as judge ad hoc in the case.

Public sittings were held between 15 and 19 December 2003.

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

On behalf of the Government of Mexico,

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

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

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

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

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

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

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

(7) That to the extent that any of the 52 convictions or sentences are not annulled, the United States shall provide, by means of its own choosing, meaningful and effective review and reconsideration of the convictions and sentences of the

52 nationals, and that this obligation cannot be satisfied by means of clemency proceedings or if any municipal law rule or doctrine inconsistent with paragraph (3) above is applied; and

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

On behalf of the Government of the United States,

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

The Court finally gives a short description of the dispute and of the facts underlying the case, and in paragraph 16 it lists by name the 52 Mexican nationals involved.

Mexican objection to the United States objections to jurisdiction and admissibility (paras. 22-25)

The Court notes at the outset that the United States has presented a number of objections to the jurisdiction of the Court, as well as to the admissibility of the claims advanced by Mexico; that it is however the contention of Mexico that all the objections raised by the United States are inadmissible as having been raised after the expiration of the time-limit laid down by Article 79, paragraph 1, of the Rules of Court as amended in 2000.

The Court notes, however, that Article 79 of the Rules applies only to preliminary objections. It observes that an objection that is not presented as a preliminary objection in accordance with paragraph 1 of Article 79 does not thereby become inadmissible; that there are of course circumstances in which the party failing to put forward an objection to jurisdiction might be held to have acquiesced in jurisdiction; that, however, apart from such circumstances, a party failing to avail itself of the Article 79 procedure may forfeit the right to bring about a suspension of the proceedings on the merits, but can still argue the objection along with the merits. The Court finds that that is indeed what the United States has done in this case; and that, for reasons to be indicated below, many of its objections are of such a nature that they would in any event probably have had to be heard along with the merits. The Court concludes that it should not exclude from consideration the objections of the United States to jurisdiction and admissibility by reason of the fact that they were not presented within three months from the date of filing of the Memorial.

United States objections to jurisdiction (paras. 26-35)

By its first jurisdictional objection, the United States suggested that the Mexican Memorial is fundamentally addressed to the treatment of Mexican nationals in the federal and state criminal justice systems of the United States, and to the operation of the United States criminal justice system as a whole; for the Court to address such issues would be an abuse of its jurisdiction. The Court recalls that its jurisdiction in the present case has been invoked under the Vienna Convention and Optional Protocol to determine the nature and extent of the obligations undertaken by the

United States towards Mexico by becoming party to that Convention. If and so far as the Court may find that the obligations accepted by the parties to the Vienna Convention included commitments as to the conduct of their municipal courts in relation to the nationals of other parties, then in order to ascertain whether there have been breaches of the Convention, the Court must be able to examine the actions of those courts in the light of international law. How far it may do so in the present case is a matter for the merits; the first objection of the United States to jurisdiction cannot therefore be upheld.

The second jurisdictional objection presented by the United States was addressed to Mexico's submission "that the United States in arresting, detaining, trying, convicting, and sentencing [to death] Mexican nationals, 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. The United States pointed out that Article 36 of the Vienna Convention "creates no obligations constraining the rights of the United States to arrest a foreign national"; and that, similarly, the "detaining, trying, convicting and sentencing" of Mexican nationals could not constitute breaches of Article 36, which merely lays down obligations of notification. The Court observes, however, that Mexico argues that depriving a foreign national facing criminal proceedings of the right to consular notification and assistance renders those proceedings fundamentally unfair. In the Court's view that is to argue in favour of a particular interpretation of the Vienna Convention. Such an interpretation may or may not be confirmed on the merits, but is not excluded from the jurisdiction conferred on the Court by the Optional Protocol to the Vienna Convention. The second objection of the United States to jurisdiction cannot therefore be upheld.

The third objection by the United States to the jurisdiction of the Court refers to the first submission concerning remedies in the Mexican Memorial, namely that Mexico is entitled to restitutio in integrum, and that the United States therefore is under an obligation to restore the status quo ante. The United States objects that this would intrude deeply into the independence of its courts; and that for the Court to declare that the United States is under a specific obligation to vacate convictions and sentences would be beyond its jurisdiction. The Court recalls in this regard, as it did in the LaGrand case, that, where jurisdiction exists over a dispute on a particular matter, no separate basis for jurisdiction is required by the Court in order to consider the remedies a party has requested for the breach of the obligation (I.C.J. Reports 2001, p. 485, para. 48). Whether or how far the Court may order the remedy requested by Mexico are matters to be determined as part of the merits of the dispute; the third objection of the United States to jurisdiction cannot therefore be upheld.

The fourth and last jurisdictional objection of the United States is that, contrary to the contentions of Mexico, "the Court lacks jurisdiction to determine whether or not consular notification is a 'human right', or to declare fundamental requirements of substantive or procedural due process". The Court observes that Mexico has presented this argument as being a matter of interpretation of Article 36, paragraph 1 (b), and therefore belonging to the merits. The Court considers that this is indeed a question of interpretation of the Vienna Convention, for which it has jurisdiction; the fourth objection of the United States to jurisdiction cannot therefore be upheld.

United States objections to admissibility (paras. 36-48)

The Court notes that the first objection of the United States under this head is that "Mexico's submissions should be found inadmissible because they seek to have this Court function as a court of criminal appeal"; that there is, in the view of the United States, "no other apt characterization of Mexico's two submissions in respect of remedies". The Court observes that this contention is addressed solely to the question of remedies. The United States does not contend on this ground that the Court should decline jurisdiction to enquire into the question of breaches of the Vienna Convention at all, but simply that, if such breaches are shown, the Court should do no more than

decide that the United States must provide "review and reconsideration" along the lines indicated in the Judgment in the LaGrand case (I.C.J. Reports 2001, pp. 513-514, para. 125). The Court notes that this is a matter of merits; the first objection of the United States to admissibility cannot therefore be upheld.

The Court then turns to the objection of the United States based on the rule of exhaustion of local remedies. The United States contends that the Court "should find inadmissible Mexico's claim to exercise its right of diplomatic protection on behalf of any Mexican national who has failed to meet the customary legal requirement of exhaustion of municipal remedies". The Court recalls that in its final submissions Mexico asks the Court to adjudge and declare that the United States, in failing to comply with Article 36, paragraph 1, of the Vienna Convention, has "violated its international legal obligations to Mexico, in its own right and in the exercise of its right of diplomatic protection of its nationals". The Court observes that the individual rights of Mexican nationals under subparagraph 1 (b) of Article 36 of the Vienna Convention are rights which are to be asserted, at any rate in the first place, within the domestic legal system of the United States. Only when that process is completed and local remedies are exhausted would Mexico be entitled to espouse the individual claims of its nationals through the procedure of diplomatic protection. In the present case Mexico does not, however, claim to be acting solely on that basis. It also asserts its own claims, basing them on the injury which it contends that it has itself suffered, directly and through its nationals, as a result of the violation by the United States of the obligations incumbent upon it under Article 36, paragraph 1 (a), (b) and (c). The Court finds that, in these special circumstances of interdependence of the rights of the State and of individual rights, Mexico may, in submitting a claim in its own name, request the Court to rule on the violation of rights which it claims to have suffered both directly and through the violation of individual rights conferred on Mexican nationals under Article 36, paragraph 1 (b). The duty to exhaust local remedies does not apply to such a request. The Court accordingly finds that the second objection by the United States to admissibility cannot be upheld.

The Court then turns to the question of the alleged dual nationality of certain of the Mexican nationals the subject of Mexico's claims. The United States contends that in its Memorial Mexico had failed to establish that it may exercise diplomatic protection based on breaches of Mexico's rights under the Vienna Convention with respect to those of its nationals who are also nationals of the United States. The Court recalls, however, that Mexico, in addition to seeking to exercise diplomatic protection of its nationals, is making a claim in its own right on the basis of the alleged breaches by the United States of Article 36 of the Vienna Convention. Seen from this standpoint, the question of dual nationality is not one of admissibility, but of merits. Without prejudice to the outcome of such examination, the third objection of the United States to admissibility cannot therefore be upheld.

The Court then turns to the fourth objection advanced by the United States to the admissibility of Mexico's claims: the contention that "The Court should not permit Mexico to pursue a claim against the United States with respect to any individual case where Mexico had actual knowledge of a breach of the [Vienna Convention] but failed to bring such breach to the attention of the United States or did so only after considerable delay." The Court recalls that in the case of Certain Phosphate Lands in Nauru (Nauru v. Australia), it observed that "delay on the part of a claimant State may render an application inadmissible", but that "international law does not lay down any specific time-limit in that regard" (I.C.J. Reports 1992, pp. 253-254, para. 32). It notes that in that case it had recognized that delay might prejudice the Respondent State, but fines that there has been no suggestion of any such risk of prejudice in the present case. So far as inadmissibility might be based on an implied waiver of rights, the Court considers that only a much more prolonged and consistent inaction on the part of Mexico than any that the United States has alleged might be interpreted as implying such a waiver. The Court notes, furthermore, that Mexico indicated a number of ways in which it brought to the attention of the United States the breaches which it perceived of the Vienna Convention; the fourth objection of the United States to admissibility cannot therefore be upheld.

The Court finally examines the objection of the United States that the claim of Mexico is inadmissible in that Mexico should not be allowed to invoke against the United States standards that Mexico does not follow in its own practice. The Court recalls in this respect that it is essential to have in mind the nature of the Vienna Convention. That Convention lays down certain standards to be observed by all States parties, with a view to the "unimpeded conduct of consular relations". Even if it were shown, therefore, that Mexico's practice as regards the application of Article 36 was not beyond reproach, this would not constitute a ground of objection to the admissibility of Mexico's claim; the fifth objection of the United States to admissibility cannot therefore be upheld.

The Court then turns to the merits of Mexico's claims.

Article 36, paragraph 1, of the Vienna Convention (paras. 49-106)

The Court notes that in the first of its final submissions, Mexico asks the Court to adjudge and declare that,

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

It recalls that it has already in its Judgment in the LaGrand case described Article 36, paragraph 1, as "an interrelated régime designed to facilitate the implementation of the system of consular protection" (I.C.J. Reports 2001, p. 492, para. 74). After citing the full text of the paragraph, the Court observes that the United States as the receiving State does not deny its duty to perform the obligations indicated therein. However, it claims that those obligations apply only to individuals shown to be of Mexican nationality alone, and not to those of dual Mexican/United States nationality. The United States further contends inter alia that it has not committed any breach of Article 36, paragraph 1 (b), upon the proper interpretation of "without delay" as used in that subparagraph.

Article 36, paragraph 1 (b) (paras. 52-90)

The Court finds that thus two major issues under Article 36, paragraph 1 (b) are in dispute between the Parties: first, the question of the nationality of the individuals concerned; and second, the question of the meaning to be given to the expression "without delay".

Nationality of the individuals concerned (paras. 53-57)

The Court begins by noting that the Parties disagree as to what each of them must show as regards nationality in connection with the applicability of the terms of Article 36, paragraph 1, and as to how the principles of evidence have been met on the facts of the cases.

The Court finds that it is for Mexico to show that the 52 persons listed in paragraph 16 of the Judgment held Mexican nationality at the time of their arrest. It notes that to this end Mexico has produced birth certificates and declarations of nationality, whose contents have not been challenged by the United States. The Court observes further that the United States has questioned whether

some of these individuals were not also United States nationals. The Court takes the view that it was for the United States to demonstrate that this was so and to furnish the Court with all information on the matter in its possession. In so far as relevant data on that matter are said by the United States to lie within the knowledge of Mexico, it was for the United States to have sought that information from the Mexican authorities. The Court finds that, at no stage, however, has the United States shown the Court that it made specific enquiries of those authorities about particular cases and that responses were not forthcoming. The Court accordingly concludes that the United States has not met its burden of proof in its attempt to show that persons of Mexican nationality were also United States nationals. The Court therefore finds that, as regards the 52 persons listed in paragraph 16 of the Judgment, the United States had obligations under Article 36, paragraph 1 (b).

Requirement to inform "without delay" (paras. 58-90)

The Court continues by noting that Mexico, in its second final submission, asks the Court to find that

> "the obligation in Article 36, paragraph 1, of the Vienna Convention requires notification of consular rights and a reasonable opportunity for consular access before the competent authorities of the receiving State take any action potentially detrimental to the foreign national's rights".

The Court notes that Mexico contends that, in each of the 52 cases before the Court, the United States failed to provide the arrested persons with information as to their rights under Article 36, paragraph 1 (b), "without delay". It further notes that the United States disputes both the facts as presented by Mexico and the legal analysis of Article 36, paragraph 1 (b), of the Vienna Convention offered by Mexico.

The Court first turns to the interpretation of Article 36, paragraph 1 (b), having found that it is applicable to the 52 persons listed in paragraph 16 of the Judgment. It begins by noting that Article 36, paragraph 1 (b), contains three separate but interrelated elements: the right of the individual concerned to be informed without delay of his rights under Article 36, paragraph 1 (b); the right of the consular post to be notified without delay of the individual's detention, if he so requests; and the obligation of the receiving State to forward without delay any communication addressed to the consular post by the detained person (this last element not having been raised in the case).

Beginning with the right of an arrested individual to information, the Court finds that the duty upon the arresting authorities to give the Article 36, paragraph 1 (b), information to the individual arises once it is realized that the person is a foreign national, or once there are grounds to think that the person is probably a foreign national. Precisely when this may occur will vary with circumstances.

Bearing in mind the complexities of establishing such a fact as explained by the United States, the Court begins by examining the application of Article 36, paragraph 1 (b), of the Vienna Convention to the 52 cases. In 45 of these cases, it finds that it has no evidence that the arrested persons claimed United States nationality, or were reasonably thought to be United States nationals, with specific enquiries being made in timely fashion to verify such dual nationality. It notes, however, that seven persons are asserted by the United States to have stated at the time of arrest that they were United States citizens.

After examination of those seven cases the Court concludes that Mexico has failed to prove the violation by the United States of its obligations under Article 36, paragraph 1 (b), in only one of

these. As regards the other individuals who are alleged to have claimed United States nationality on arrest, the Court finds that the argument of the United States cannot be upheld.

The Court points out that the question nonetheless remains as to whether, in each of these 51 cases, the United States did provide the required information to the arrested persons "without delay". It is to that question that the Court then turns. The Court notes that in 47 cases the United States nowhere challenges the fact that the Mexican nationals were never informed of their rights under Article 36, paragraph 1 (b), but that in four cases some doubt remains whether the information that was given was provided "without delay"; for these, some examination of the term is thus necessary.

The Court notes that the Parties have very different views on this. According to Mexico, the timing of the notice to the detained person "is critical to the exercise of the rights provided by Article 36" and the phrase "without delay" in paragraph 1 (b) requires "unqualified immediacy". Mexico further contends that, in view of the object and purpose of Article 36**,** which is to enable "meaningful consular assistance" and the safeguarding of the vulnerability of foreign nationals in custody, "consular notification …must occur immediately upon detention and prior to any interrogation of the foreign detainee, so that the consul may offer useful advice about the foreign legal system and provide assistance in obtaining counsel before the foreign national makes any ill-informed decisions or the State takes any action potentially prejudicial to his rights".

The United States disputed this interpretation of the phrase "without delay". In its view it did not mean "immediately, and before interrogation" and such an understanding was supported neither by the terminology, nor by the object and purpose of the Vienna Convention, nor by its travaux préparatoires. According to the United States, the purpose of Article 36 was to facilitate the exercise of consular functions by a consular officer: "The significance of giving consular information to a national is thus limited . . . It is a procedural device that allows the foreign national to trigger the related process of notification . . . [It] cannot possibly be fundamental to the criminal justice process."

The Court begins by noting that the precise meaning of "without delay", as it is to be understood in Article 36, paragraph 1 (b), is not defined in the Convention. This phrase therefore requires interpretation according to the customary rules of treaty interpretation reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties. After examination of the text of the Vienna Convention on Consular Relations, its object and purpose, as well as its travaux préparatoires, the Court finds that "without delay" is not necessarily to be interpreted as "immediately" upon arrest, nor can it be interpreted to signify that the provision of the information must necessarily precede any interrogation, so that the commencement of interrogation before the information is given would be a breach of Article 36. The Court observes, however, that there is nonetheless a duty upon the arresting authorities to give the information to an arrested person as soon as it is realized that the person is a foreign national, or once there are grounds to think that the person is probably a foreign national.

Applying this interpretation of "without delay" to the facts of the four outstanding cases, the Court finds that the United States was in breach of its obligations under Article 36, paragraph 1 (b), in respect of these individuals also. The Court accordingly concludes that, with respect to all save one of the 52 individuals listed in paragraph 16 of the Judgment, the United States has violated its obligation under Article 36, paragraph 1 (b), of the Vienna Convention to provide information to the arrested person.

Article 36, paragraph 1 (a) and (c) (paras. 91-107)

The Court begins by recalling its observation above that Article 36, paragraph 1 (b), contains three elements. Thus far, it observes, it has been dealing with the right of an arrested person to be

informed that he may ask for his consular post to be notified. The Court then turns to another aspect of Article 36, paragraph 1 (b). It finds the United States is correct in observing that the fact that a Mexican consular post was not notified under Article 36, paragraph 1 (b), does not of necessity show that the arrested person was not informed of his rights under that provision. He may have been informed and declined to have his consular post notified. The Court finds in one of the two cases mentioned by the United States in this respect, that that was the case. In two of three further cases in which the United States alleges that the consular post was formally notified without prior information to the individual, the Court finds that the United States did violate its obligations under Article 36, paragraph 1 (b).

The Court notes that, in the first of its final submissions, Mexico also asks the Court to find that the violations it ascribes to the United States in respect of Article 36, paragraph 1 (b), have also deprived "Mexico of its right to provide consular protection and the 52 nationals' right to receive such protection as Mexico would provide under Article 36 (1) (a) and (c) of the Convention".

The Court recalls that the relationship between the three subparagraphs of Article 36, paragraph 1, has been described by it in its Judgment in the LaGrand case (I.C.J. Reports 2001, p. 492, para. 74) as "an interrelated régime". The legal conclusions to be drawn from that interrelationship necessarily depend upon the facts of each case. In the LaGrand case, the Court found that the failure for 16 years to inform the brothers of their right to have their consul notified effectively prevented the exercise of other rights that Germany might have chosen to exercise under subparagraphs (a) and (c). The Court is of the view that it is necessary to revisit the interrelationship of the three subparagraphs of Article 36, paragraph 1, in the light of the particular facts and circumstances of the present case.

It first recalls that, in one case, when the defendant was informed of his rights, he declined to have his consular post notified. Thus in this case there was no violation of either subparagraph (a) or subparagraph (c) of Article 36, paragraph 1.

In the remaining cases, because of the failure of the United States to act in conformity with Article 36, paragraph 1 (b), Mexico was in effect precluded (in some cases totally, and in some cases for prolonged periods of time) from exercising its right under paragraph 1 (a) to communicate with its nationals and have access to them. As the Court has already had occasion to explain, it is immaterial whether Mexico would have offered consular assistance, "or whether a different verdict would have been rendered. It is sufficient that the Convention conferred these rights" (I.C.J. Reports 2001, p. 492, para. 74), which might have been acted upon.

The Court observes that the same is true, pari passu, of certain rights identified in subparagraph (c): "consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, and to converse and correspond with him . . .". Mexico, it notes, laid much emphasis in this litigation upon the importance of consular officers being able to arrange for such representation before and during trial, and especially at sentencing, in cases in which a severe penalty may be imposed. Mexico has further indicated the importance of any financial or other assistance that consular officers may provide to defence counsel, inter alia for investigation of the defendant's family background and mental condition, when such information is relevant to the case. The Court observes that the exercise of the rights of the sending State under Article 36, paragraph 1 (c), depends upon notification by the authorities of the receiving State. It may be, however, that information drawn to the attention of the sending State by other means may still enable its consular officers to assist in arranging legal representation for its national. The Court finds that has been so in 13 cases.

The Court concludes on this aspect of the case in paragraph 106 of the Judgment, where it summarizes its findings as to the violation of the different obligations incumbent upon the United States under Article 36, paragraph 1, in the cases before it.

Article 36, paragraph 2 of the Vienna Convention (paras. 107-114)

The Court then recalls that in its third final submission Mexico asks the Court to adjudge and declare that "the United States violated its obligations under Article 36 (2) of the Vienna Convention by failing to provide meaningful and effective review and reconsideration of convictions and sentences impaired by a violation of Article 36 (1)". More specifically, Mexico contends that:

> "The United States uses several municipal legal doctrines to prevent finding any legal effect from the violations of Article 36. First, despite this Court's clear analysis in LaGrand, 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."

Against this contention by Mexico, the United States argues that:

> "the criminal justice systems of the United States address all errors in process through both judicial and executive clemency proceedings, relying upon the latter when rules of default have closed out the possibility of the former. That is, the 'laws and regulations' of the United States provide for the correction of mistakes that may be relevant to a criminal defendant to occur through a combination of judicial review and clemency. These processes together, working with other competent authorities, give full effect to the purposes for which Article 36 (1) is intended, in conformity with Article 36 (2). And, insofar as a breach of Article 36 (1) has occurred, these procedures satisfy the remedial function of Article 36 (2) by allowing the United States to provide review and reconsideration of convictions and sentences consistent with LaGrand."

The Court observes that it has already considered the application of the so called "procedural default" rule in the LaGrand case, when the Court addressed the issue of its implications for the application of Article 36, paragraph 2, of the Vienna Convention. The Court emphasized that "a distinction must be drawn between that rule as such and its specific application in the present case" stating:

> "In itself, the rule does not violate Article 36 of the Vienna Convention. The problem arises when the procedural default rule does not allow the detained individual to challenge a conviction and sentence by claiming, in reliance on Article 36, paragraph 1, of the Convention, that the competent national authorities failed to comply with their obligation to provide the requisite consular information 'without delay', thus preventing the person from seeking and obtaining consular assistance from the sending State." (I.C.J. Reports 2001, p. 497, para. 90.)

On this basis, the Court concluded that "the procedural default rule prevented counsel for the LaGrands to effectively challenge their convictions and sentences other than on United States constitutional grounds" (ibid., para. 91). The Court deems this statement to be equally valid in relation to the present case, where a number of Mexican nationals have been placed exactly in such a situation.

The Court further observes that the procedural default rule has not been revised, nor has any provision been made to prevent its application in cases where it has been the failure of the United States itself to inform that may have precluded counsel from being in a position to have raised the question of a violation of the Vienna Convention in the initial trial. The Court notes moreover that in several of the cases cited in Mexico's final submissions the procedural default rule has already

been applied, and that in others it could be applied at subsequent stages in the proceedings. It also points out, however, that in none of the cases, save for the three mentioned below, have the criminal proceedings against the Mexican nationals concerned already reached a stage at which there is no further possibility of judicial re-examination of those cases; that is to say, all possibility is not yet excluded of "review and reconsideration" of conviction and sentence, as called for in the LaGrand case, and as explained in subsequent paragraphs of the Judgment. The Court finds that it would therefore be premature for the Court to conclude at this stage that, in those cases, there is already a violation of the obligations under Article 36, paragraph 2, of the Vienna Convention.

By contrast, the Court notes that in the case of three named Mexican nationals, conviction and sentence have become final. Moreover, in one of these cases, the Oklahoma Court of Criminal Appeals has set an execution date. The Court finds therefore that it must conclude that, subject to its observations below in regard to clemency proceedings, in relation to these three individuals, the United States is in breach of its obligations under Article 36, paragraph 2, of the Vienna Convention.

Legal consequences of the breach (paras. 115-150)

Having concluded that in most of the cases brought before the Court by Mexico in the 52 instances, there has been a failure to observe the obligations prescribed by Article 36, paragraph 1 (b), of the Vienna Convention, the Court proceeds to the examination of the legal consequences of such a breach and of the legal remedies therefor.

It recalls that Mexico in its fourth, fifth and sixth submissions asks the Court to adjudge and declare:

> "(4) that pursuant to the injuries suffered by Mexico in its own right and in the exercise of diplomatic protection of its nationals, Mexico is entitled to full reparation for these injuries in the form of restitutio in integrum;
>
> (5) that this restitution consists of the obligation to restore the status quo ante by annulling or otherwise depriving of full force or effect the conviction and sentences of all 52 Mexican nationals; [and]
>
> (6) that this restitution also includes the obligation to take all measures necessary to ensure that a prior violation of Article 36 shall not affect the subsequent proceedings."

The United States on the other hand argues:

> "LaGrand's holding calls for the United States to provide, in each case, 'review and reconsideration' that 'takes account of' the violation, not 'review and reversal', not across-the-board exclusions of evidence or nullification of convictions simply because a breach of Article 36 (1) occurred and without regard to its effect upon the conviction and sentence and, not . . . 'a precise, concrete, stated result: to re-establish the status quo ante'".

The Court points out that its task in the present case is to determine what would be adequate reparation for the violations of Article 36. The Court finds it to be clear from what has been observed above that the internationally wrongful acts committed by the United States were the failure of its competent authorities to inform the Mexican nationals concerned, to notify Mexican consular posts and to enable Mexico to provide consular assistance. It is of the view that it follows that the remedy to make good these violations should consist in an obligation on the United States to permit review and reconsideration of these nationals' cases by the United States courts, with a

view to ascertaining whether in each case the violation of Article 36 committed by the competent authorities caused actual prejudice to the defendant in the process of administration of criminal justice.

The Court considers that it is not to be presumed, as Mexico asserts, that partial or total annulment of conviction or sentence provides the necessary and sole remedy. In the present case it is not the convictions and sentences of the Mexican nationals which are to be regarded as a violation of international law, but solely certain breaches of treaty obligations which preceded them. Mexico, the Court notes, has further contended that the right to consular notification and consular communication under the Vienna Convention is a human right of such a fundamental nature that its infringement will ipso facto produce the effect of vitiating the entire process of the criminal proceedings conducted in violation of this fundamental right. The Court observes that the question of whether or not the Vienna Convention rights are human rights is not a matter that it need decide. It points out, however, that neither the text nor the object and purpose of the Convention, nor any indication in the travaux préparatoires, support the conclusion that Mexico draws from its contention in that regard. The Court finds that for these reasons, Mexico's fourth and fifth submissions cannot be upheld.

In elaboration of its sixth submission, Mexico contends that "As an aspect of restitutio in integrum, Mexico is also entitled to an order that in any subsequent criminal proceedings against the nationals, statements and confessions obtained prior to notification to the national of his right to consular assistance be excluded". The Court is of the view that this question is one which has to be examined under the concrete circumstances of each case by the United States courts concerned in the process of their review and reconsideration. For this reason, the sixth submission of Mexico cannot be upheld.

Although rejecting the fourth, fifth and sixth submissions of Mexico relating to the remedies for the breaches by the United States of its international obligations under Article 36 of the Vienna Convention, the Court points out that the fact remains that such breaches have been committed, and that it is thus incumbent upon the Court to specify what remedies are required in order to redress the injury done to Mexico and to its nationals by the United States through non-compliance with those international obligations.

In this regard, the Court recalls that Mexico's seventh submission also asks the Court to adjudge and declare:

> "That to the extent that any of the 52 convictions or sentences are not annulled, the United States shall provide, by means of its own choosing, meaningful and effective review and reconsideration of the convictions and sentences of the 52 nationals, and that this obligation cannot be satisfied by means of clemency proceedings or if any municipal law rule or doctrine [that fails to attach legal significance to an Article 36 (1) violation] is applied."

On this question of "review and reconsideration", the United States takes the position that it has conformed its conduct to the LaGrand Judgment. In a further elaboration of this point, the United States argues that "[t]he Court said in LaGrand that the choice of means for allowing the review and reconsideration it called for 'must be left' to the United States".

The Court points out that, in stating in its Judgment in the LaGrand case that "the United States of America, by means of its own choosing, shall allow the review and reconsideration of the conviction and sentence" (I.C.J. Reports 2001, p. 516, para. 128; emphasis added), the Court acknowledged that the concrete modalities for such review and reconsideration should be left primarily to the United States. It should be underlined, however, that this freedom in the choice of means for such review and reconsideration is not without qualification: as the passage of the Judgment quoted above makes abundantly clear, such review and reconsideration has to be carried

out "by taking account of the violation of the rights set forth in the Convention" (I.C.J. Reports 2001, p. 514, para. 125), including, in particular, the question of the legal consequences of the violation upon the criminal proceedings that have followed the violation.

The Court observes that the current situation in the United States criminal procedure, as explained by the Agent at the hearings, is such that a claim based on the violation of Article 36, paragraph 1, of the Vienna Convention, however meritorious in itself, could be barred in the courts of the United States by the operation of the procedural default rule. The Court is of the view that the crucial point in this situation is that, by the operation of the procedural default rule as it is applied at present, the defendant is effectively limited to seeking the vindication of his rights under the United States Constitution.

The Court takes note in this regard that Mexico, in the latter part of its seventh submission, has stated that "this obligation [of providing review and reconsideration] cannot be satisfied by means of clemency proceedings". Furthermore, Mexico argues that the clemency process is in itself an ineffective remedy to satisfy the international obligations of the United States. It concludes: "clemency review is standardless, secretive, and immune from judicial oversight".

Against this contention of Mexico, the United States claims that it "gives 'full effect' to the 'purposes for which the rights accorded under [Article 36, paragraph 1,] are intended' through executive clemency". It argues that "[t]he clemency process is well suited to the task of providing review and reconsideration". The United States explains that, "Clemency . . . is more than a matter of grace; it is part of the overall scheme for ensuring justice and fairness in the legal process" and that "Clemency procedures are an integral part of the existing 'laws and regulations' of the United States through which errors are addressed".

The Court emphasizes that the "review and reconsideration" prescribed by it in the LaGrand case should be effective. Thus it should "tak[e] account of the violation of the rights set forth in [the] Convention" (I.C.J. Reports 2001, p. 516, para. 128 (7)) and guarantee that the violation and the possible prejudice caused by that violation will be fully examined and taken into account in the review and reconsideration process. Lastly, review and reconsideration should be both of the sentence and of the conviction.

Accordingly, in a situation of the violation of rights under Article 36, paragraph 1, of the Vienna Convention, the defendant raises his claim in this respect not as a case of "harm to a particular right essential to a fair trial" — a concept relevant to the enjoyment of due process rights under the United States Constitution — but as a case involving the infringement of his rights under Article 36, paragraph 1. The rights guaranteed under the Vienna Convention are treaty rights which the United States has undertaken to comply with in relation to the individual concerned, irrespective of the due process rights under United States constitutional law. The Court is of the view that, in cases where the breach of the individual rights of Mexican nationals under Article 36, paragraph 1 (b), of the Convention has resulted, in the sequence of judicial proceedings that has followed, in the individuals concerned being subjected to prolonged detention or convicted and sentenced to severe penalties, the legal consequences of this breach have to be examined and taken into account in the course of review and reconsideration. The Court considers that it is the judicial process that is suited to this task.

As regards the clemency procedure, the Court points out what is at issue in the present case is whether the clemency process as practised within the criminal justice systems of different states in the United States can, in and of itself, qualify as an appropriate means for undertaking the effective "review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention", as the Court prescribed in the LaGrand Judgment (I.C.J. Reports 2001, p. 514, para. 125). The Court notes that the clemency process, as currently practised within the United States criminal justice system, does not appear to meet the

above-mentioned requirements and that it is therefore not sufficient in itself to serve as an appropriate means of "review and reconsideration" as envisaged by the Court in the LaGrand case.

Finally, the Court considers the eighth submission of Mexico, in which it asks the Court to adjudge and declare:

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

The Court recalls that Mexico, although recognizing the efforts by the United States to raise awareness of consular assistance rights, notes with regret that "the United States program, whatever its components, has proven ineffective to prevent the regular and continuing violation by its competent authorities of consular notification and assistance rights guaranteed by Article 36". It also recalls that the United States contradicts this contention of Mexico by claiming that "its efforts to improve the conveyance of information about consular notification are continuing unabated and are achieving tangible results". It contends that Mexico "fails to establish a 'regular and continuing' pattern of breaches of Article 36 in the wake of LaGrand".

Referring to the fact that the Mexican request for guarantees of non-repetition is based on its contention that beyond 52 cases there is a "regular and continuing pattern of breaches by the United States of Article 36, the Court observes that, in this respect, there is no evidence properly before it that would establish a general pattern. While it is a matter of concern that, even in the wake of the LaGrand Judgment, there remain a substantial number of cases of failure to carry out the obligation to furnish consular information to Mexican nationals. The Court notes that the United States has been making considerable efforts to ensure that its law enforcement authorities provide consular information to every arrested person they know or have reason to believe is a foreign national. The Court further notes in this regard that in the LaGrand case Germany sought, inter alia, "a straightforward assurance that the United States will not repeat its unlawful acts" (I.C.J. Reports 2001, p. 511, para. 120). With regard to this general demand for an assurance of non-repetition, the Court stated:

> "If a State, in proceedings before this Court, repeatedly refers to substantial activities which it is carrying out in order to achieve compliance with certain obligations under a treaty, then this expresses a commitment to follow through with the efforts in this regard. The programme in question certainly cannot provide an assurance that there will never again be a failure by the United States to observe the obligations of notification under Article 36 of the Vienna Convention. But no State could give such a guarantee and Germany does not seek it. The Court considers that the commitment expressed by the United States to ensure implementation of the specific measures adopted in performance of its obligations under Article 36, paragraph 1 (b), must be regarded as meeting Germany's request for a general assurance of non-repetition." (I.C.J. Reports 2001, pp. 512-513, para. 124.)

The Court believes that as far as the request of Mexico for guarantees and assurances of non-repetition is concerned, what the Court stated in this passage of the LaGrand Judgment remains applicable, and therefore meets that request.

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The Court then re-emphasizes a point of importance. It points out that in the present case it has been addressing the issues of principle raised in the course of the present proceedings from the viewpoint of the general application of the Vienna Convention, and there can be no question of making an a contrario argument in respect of any of the Court's findings in the present Judgment. In other words, the fact that in this case the Court's ruling has concerned only Mexican nationals cannot be taken to imply that the conclusions reached by it in the present Judgment do not apply to other foreign nationals finding themselves in similar situations in the United States.

The Court finally points out that its Order of 5 February 2003 indicating provisional measures mentioned above, according to its terms and to Article 41 of the Statute, was effective pending final judgment, and that the obligations of the United States in that respect are, with effect from the date of the Judgment, replaced by those declared in this Judgment. The Court observes that it has found in relation to the three persons concerned in the Order (among others), that the United States has committed breaches of its obligations under Article 36, paragraph 1, of the Vienna Convention; and that moreover, in respect of those three persons alone, the United States has also committed breaches of Article 36, paragraph 2. The review and reconsideration of conviction and sentence required by Article 36, paragraph 2, which is the appropriate remedy for breaches of Article 36, paragraph 1, has not been carried out. The Court considers that in these three cases it is for the United States to find an appropriate remedy having the nature of review and reconsideration according to the criteria indicated in the Judgment.

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In subparagraphs 4 to 11 (on the merits) of operative paragraph 153 of its Judgment, the Court

— "finds, by fourteen votes to one, that, by not informing, without delay upon their detention, the 51 Mexican nationals referred to in paragraph 106 (1) above of their rights under Article 36, paragraph 1 (b), of the Vienna Convention on Consular Relations of 24 April 1963, the United States of America breached the obligations incumbent upon it under that subparagraph;

— finds, by fourteen votes to one, that, by not notifying the appropriate Mexican consular post without delay of the detention of the 49 Mexican nationals referred to in paragraph 106 (2) above and thereby depriving the United Mexican States of the right, in a timely fashion, to render the assistance provided for by the Vienna Convention to the individuals concerned, the United States of America breached the obligations incumbent upon it under Article 36, paragraph 1 (b);

— finds, by fourteen votes to one, that, in relation to the 49 Mexican nationals referred to in paragraph 106 (3) above, the United States of America deprived the United Mexican States of the right, in a timely fashion, to communicate with and have access to those nationals and to visit them in detention, and thereby breached the obligations incumbent upon it under Article 36, paragraph 1 (a) and (c), of the Convention;

— finds, by fourteen votes to one, that, in relation to the 34 Mexican nationals referred to in paragraph 106 (4) above, the United States of America deprived the United Mexican States of the right, in a timely fashion, to arrange for legal representation of those nationals, and thereby breached the obligations incumbent upon it under Article 36, paragraph 1 (c), of the Convention;

— finds, by fourteen votes to one, that, by not permitting the review and reconsideration, in the light of the rights set forth in the Convention, of the conviction and sentences of Mr. César Roberto Fierro Reyna, Mr. Roberto Moreno Ramos and Mr. Osvaldo Torres

Aguilera, after the violations referred to in subparagraph (4) above had been established in respect of those individuals, the United States of America breached the obligations incumbent upon it under Article 36, paragraph 2, of the Convention;

— finds, by fourteen votes to one, that the appropriate reparation in this case consists in the obligation of the United States of America to provide, by means of its own choosing, review and reconsideration of the convictions and sentences of the Mexican nationals referred to in subparagraphs (4), (5), (6) and (7) above, by taking account both of the violation of the rights set forth in Article 36 of the Convention and of paragraphs 138 to 141 of this Judgment;

— unanimously takes note of the commitment undertaken by the United States of America to ensure implementation of the specific measures adopted in performance of its obligations under Article 36, paragraph 1 (b), of the Vienna Convention; and finds that this commitment must be regarded as meeting the request by the United Mexican States for guarantees and assurances of non-repetition;

— unanimously finds that, should Mexican nationals nonetheless be sentenced to severe penalties, without their rights under Article 36, paragraph 1 (b), of the Convention having been respected, the United States of America shall provide, by means of its own choosing, review and reconsideration of the conviction and sentence, so as to allow full weight to be given to the violation of the rights set forth in the Convention, taking account of paragraphs 138 to 141 of this Judgment."

Declaration of President Shi

In voting in favour of operative paragraph 153 of the Judgment, President Shi makes it clear that he still maintains his views as expressed in his separate opinion annexed to the LaGrand Judgment (I.C.J. Reports 2001, pp. 518-524) with regard both to the Court's interpretation that Article 36, paragraphs (1) and (2), of the Vienna Convention on Consular Relations creates individual rights, and to the Court's ruling on "review and reconsideration of the conviction and sentence" as a form of remedy for breach by the receiving State of its obligations under Article 36 of the Convention.

Declaration of Vice-President Ranjeva

Judge Raymond Ranjeva, Vice-President, has attached a declaration primarily concerning the question of evidence and the request for diplomatic protection submitted by Mexico. The distinction between the burden of proof and the burden of evidence was rightly rebutted by the Judgment as it has no known relevance in international law; in the absence of the principle nemo contra se edere tenetur**,** the Corfu Channel case gives the Court jurisdiction to define the factual consequences of failure to produce documents likely to support an argument.

Concerning the Mexican request relating to diplomatic protection, the author of the declaration considers that the Vienna Convention on Consular Relations, in explicitly recognizing individual rights to foreign nationals in detention, does not provide for diplomatic protection. The interdependence between the rights set out in Article 36 of the Vienna Convention on Consular Relations points to the correlation between the initiative by the sending State to uphold the individual rights of its nationals and the lack of refusal by the national held in detention. This correlation makes it possible for a foreign national who has been arrested to object to the consular post of his State being informed. For its part, the sending State may demand observance of its own law once the foreign origin of the arrested person has been established.

Separate opinion of Judge Vereshchetin

In his separate opinion, Judge Vereshchetin puts on record his disagreement with that part of the Court's reasoning where it deals with the issues concerning the law of diplomatic protection and the related rule of the exhaustion of local remedies (para. 40 of the Judgment).

In rejecting the United States contention that Mexico's claims brought under the head of diplomatic protection of its nationals are inadmissible, the Court, in the view of Judge Vereshchetin, has resorted to reasoning which amounts to a highly problematic new legal proposition in respect of the law of diplomatic protection. In deviation from the general requirement of the exhaustion of local remedies where an international claim is brought by a State in espousal of the rights of its nationals, the Judgment finds that the duty to exhaust local remedies does not apply to the Mexican request because of the special circumstances of interdependence of the rights of the State and of individual rights under Article 36 of the Vienna Convention.

Having analysed the jurisprudence of the Court dealing with the law of diplomatic protection and the Draft Articles on Diplomatic Protection, recently elaborated by the International Law Commission (ILC), Judge Vereshchetin concludes that in the present case there were no compelling reasons to deviate from the "preponderance" standard applied in the former Court's jurisprudence and in the ILC Draft Articles with regard to "mixed" claims brought by a State in its own right and in the exercise of its right of diplomatic protection of its nationals.

The rule of exhaustion of local remedies does not apply here not because of the special character of Article 36 of the Vienna Convention on Consular Relations, which impliedly differs in kind from other treaty provisions creating rights of individuals, but rather because of the very special circumstances of the case at hand. At the time when the Application was filed, all the Mexican nationals concerned were already on death row. In those circumstances, to demand that all the local remedies should have been completely exhausted before Mexico could exercise its right of diplomatic protection of those nationals, could lead to the absurd result of this Court having to rule when its ruling could have no practical effect.

Separate opinion of Judge Parra-Aranguren

Judge Parra-Aranguren considers that the preliminary objections raised by the United States of America ("the United States") should have been disregarded for it gave its consent not to raise preliminary objections when agreeing to a single round of pleadings and not saying anything about preliminary objections. For this reason he voted against paragraph 153 (1) of the Judgment.

The United States "has chosen to vehemently deny any wrongdoing", as indicated by Mexico. Mexico acknowledged its obligation to demonstrate the Mexican nationality of each of the 52 persons identified in its Memorial. It presented to this end declarations of 42 of them stating their Mexican nationality and 52 birth certificates attesting that each one of them was born in Mexico, explaining that they automatically acquired iure soli Mexican nationality, as prescribed in Article 30 of the Mexican Constitution.

In the opinion of Judge Parra-Aranguren the declarations presented are ex parte documents which cannot demonstrate the nationality of the 42 persons concerned; and the birth certificates undoubtedly prove that each of the 52 persons mentioned in Mexico's Memorial were born in Mexico but not that they are Mexican nationals. Mexico did not present the text of Article 30 of its constitution and "insofar as the International Court of Justice is called upon to express an opinion as to the effect of a rule of national law it will do so by treating the matter as a question of fact to be established as such rather than as a question of law to be decided by the court." (Oppenheim's International Law, Ninth Edition, edited by Sir Robert Jennings, Q.C., and Sir Arthur Watts, K.C.M.G., Q.C., Vol. 1, "Peace", Introduction and Part 1, 1996, p. 83, para. 21.) This is a generally accepted rule, as indicated by Judge John E. Read when referring to a long series of decisions rendered by the Permanent Court of International Justice which applied the principle that "municipal laws are merely facts" (Nottebohm, Second Phase, Judgment, I.C.J. Reports 1955, dissenting opinion of Judge Read, p. 36). Consequently, Judge Parra-Aranguren considers that Mexico did not discharge its burden of proof by failing to present the text of Article 30 of its constitution. Consequently, this omission does not enable it to be established from the evidence presented by Mexico, that the 52 persons identified in its Memorial automatically acquired iure soli Mexican nationality. For this reason, unless one were to rely on extralegal considerations as the Judgment did, in his opinion there was no other way but to conclude that the claims presented by Mexico against the United States cannot be upheld since Mexican nationality of the 52 persons concerned was not demonstrated and it is, in the present case, a necessary condition for the application of Article 36 of the Vienna Convention and for Mexico's exercise of its right to diplomatic protection of its nationals. Therefore the failure of Mexico to prove the Mexican nationality of the 52 persons identified in its Memorial is the fundamental reason for his vote against paragraph 153, subparagraphs (4), (5), (6), (7), (8) and (9).

Paragraph 40 states that the exhaustion of the local remedies rule does not apply to the request contained in the first final submission of Mexico asking the Court to declare that the United States violated its international legal obligations to Mexico, in its own right and in the exercise of its right to diplomatic protection of its nationals. Judge Parra-Aranguren does not agree with such conclusion because in his opinion the exhaustion of the local remedies rule applies in cases in which the claimant State has been injured indirectly, that is, through its national and does not apply

where it has been directly injured by the wrongful act of another State. As the International Law Commission has recently observed "[i]n practice it is difficult to decide whether the claim is 'direct' or 'indirect' where it is 'mixed', in the sense that it contains elements of both injury to the State and injury to the nationals of the State." This is the case in the present proceedings, as paragraph 40 acknowledges when indicating the "special circumstances of interdependence of the rights of the State and of individual rights", and for this reason the Court should have examined the different elements of the claim "to decide whether the direct or the indirect element is preponderant"; it also being possible to apply the sine qua non or "but for" test, which asks whether the claim comprising elements of both direct and indirect injury would have been brought were it not for the claim on behalf of the injured national (United Nations, Report of the International Law Commission, Fifty-Fifth Session (5 May–6 June and 7 July–8 August 2003), Official Records of the General Assembly, Fifty-Eighth Session, Supplement No. 10 (A/58/10), pp. 89-90). Judge Parra-Aranguren considers that Mexico would not have presented its claim against the United States but for the injury suffered by its nationals and that therefore the local remedies rule applies to the claims "in its own right" submitted by Mexico in its first final submission. Accordingly, the Court should have examined each of the individual cases to determine whether the local remedies had been exhausted; if that were not the case, the corresponding claim presented by Mexico in the exercise of diplomatic protection of its nationals should have been dismissed, unless it was covered by any of the customarily accepted exceptions to the local remedies rule, taking into consideration Article 10 of the Draft Articles on Diplomatic Protection prepared by the International Law Commission.

Judge Parra-Aranguren wishes to emphasize that time constraints to present his separate opinion within the period fixed by the Court did not permit him to make a complete explanation of his disagreement with subparagraphs (4), (5), (6), (7), (8) and (9) of paragraph 153.

Separate opinion of Judge Tomka

In his separate opinion, Judge Tomka expresses the view that the Court could only arrive at the conclusion that the individual rights of Mexican nationals were violated if it accepted Mexico's submission claiming its right to exercise diplomatic protection.

In that case, it would not have been appropriate to disregard the United States objection that the Mexican nationals failed to exhaust local remedies. However, in view of the practice of United States courts which, in the past, have failed for various reasons to provide effective relief for violations of individual rights under Article 36, paragraph 1(b), of the Vienna Convention, Judge Tomka concludes that the exhaustion of local remedies does not apply in the present case.

Judge Tomka expresses some doubt as to the idea that the obligation to inform an arrested foreign national of his rights under Article 36 of the Vienna Convention only applies once the arresting authorities realize that the individual is a foreign national or have grounds for so believing. He takes the view that the obligation to give consular information arises upon the detention of the foreign national.

Judge Tomka agrees with the Court's finding that it cannot uphold Mexico's request seeking the cessation by the United States of any violations of its obligations under Article 36 of the Vienna Convention, because Mexico has not established that those violations are of a continuing nature. He does not find it pertinent to take account of the fact that criminal proceedings against the 52 individuals remain pending before domestic courts or to consider the nature of the appropriate remedy, in relation to the obligation of cessation.

Separate opinion of Judge ad hoc Sepúlveda

Judge ad hoc Sepúlveda has stated that, even if he is basically in agreement with most of the findings of the Court, he has some misgivings and reservations about the reasoning employed by the Court to reach certain conclusions. The following are the main ones:

(1) The Court has opted in favour of a restricted interpretation of the law of State responsibility, providing a limited reach to the claims for reparation sought by Mexico.

(2) The decision of the Court is not sufficiently clear in answering the request of Mexico asking it to adjudge that the United States violated its international legal obligations to Mexico, in its own right and in the exercise of its right to diplomatic protection of its nationals.

(3) The present Judgment departs substantially from the findings in the LaGrand Judgment on matters related to the circumstances in which local remedies must be exhausted, to the application of the procedural default rule, and to the question of denial of justice.

(4) It is factually and legally incorrect to assume that information drawn to the attention of the sending State by means different from those established in Article 36 of the Vienna Convention may still enable consular affairs to assist in arranging legal representation. A review of the cases quoted in the Judgment shows that in most if not all cases legal representation was badly needed from the very beginning.

(5) There is an intimate link between the Miranda warning and Article 36 of the Vienna Convention, in the sense that both aim at creating a scheme of protection of rights that directly impinge on the fairness of a trial. Consular protection may be an important element for due process of law, especially in capital cases.

(6) Full reparation seems unlikely to be achieved if the ambiguity of the notion of "by means of its own choosing" remains, and is not strengthened with the addition of some specific measures.

(7) The Court should have found the need for the cessation of the violations of Article 36 of the Vienna Convention by the United States.

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