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EL FALLO "AVENA" DE LA CORTE INTERNACIONAL DE JUSTICIA Y LA VIOLACIÓN DE LOS DERECHOS CONSULARES DE LOS DETENIDOS EXTRANJEROS

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con la colaboración de Daniel Ontiveros

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It has been constantly maintained and
also admitted by the Government of the United States
that a government can not appeal
to its municipal regulations
as an answer to demands for
fulfilment of international duties

Secretary of State Bayard to Chargé in México
1 de noviembre de 1887
Foreign Relations of the United States, 1887.751, 753

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PALABRAS PRELIMINARES DEL AUTOR

La presente obra se basa en una primera versión publicada por la Universidad de Monterrey en 2005. Por la importancia del tema y por solicitud del gobierno boliviano, el autor aceptó de publicar una nueva edición actualizada. Visto los numerosos ciudadanos bolivianos que se encuentran lejos de su patria, y que son objeto de una constante preocupación por cualquier gobierno, el fallo "Avena" de la Corte internacional de Justicia y sus consecuencias legales tienen que difundidos al público boliviano con el fin que el principio de la igualdad ante la ley tenga una verdadera aplicación para todos los conacionales en ten cualquier país que se encuentren.

El autor fue involucrado como asesor en los casos de Osvaldo Torres, así como varios otros asuntos de la misma índole. Sin embargo, el presente ensayo se destina a presentar académicamente puntos de vista sobre el objeto del estudio. Por lo tanto, el presente escrito no refleja necesariamente la postura del abogado o de su despacho, sino las ideas del académico. Consecuentemente, de ninguna manera las posiciones expresadas en la presente obra vinculan al despacho o a sus abogados, los cuales quedan libres de opinar de manera distinta si las circunstancias lo exigen.

Unos conceptos legales pueden referirse al derecho mexicano, en la medida en que el fallo "Avena"de la Corte Internacional de Justicia concernió exclusivamente ciudadanos mexicanos condenados en los Estados Unidos de América. Sin embargo, no cabe duda, que las observaciones pueden aplicarse *mutatis mutandis* a las nociones propias al derecho boliviano.

La Paz, Bolivia, diciembre 2007

Introducción

1. La existencia de las relaciones consulares tal como las conocemos hoy en fecha se remontan al siglo XVI[1]. A partir del siglo XVIII, se desarrolló la voluntad de codificar la institución del cónsul. Una primera propuesta doctrinal emanó del Instituto de Derecho Internacional en la sesión de Venecia de 1896. En 1928, la Conferencia de La Habana estableció el primer instrumento multilateral sobre las relaciones consulares. En 1956, la Comisión de Derecho Internacional de las Naciones Unidas empezó sus trabajos sobre el tema, para proponer en 1963 el texto final que fue firmado por los Estados el 24 de abril del mismo año: la Convención de Viena sobre las Relaciones Consulares.

La Convención de Viena

2. La Convención de Viena[2] fue hecha para codificar las reglas consuetudinarias en materia de relaciones diplomáticas entre los Estados. El artículo 36, en inglés como idioma auténtico, prevé que:

> *1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:*
>
> *(a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;*
>
> *(b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without*

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[1] Pisen, *Voelkerrecht*, 4° ed., 1999, Munich, CH Beck , p. 522 sq.

[2] Hecha en la ciudad de Viena, Austria, el 24 de abril de 1963.

> *delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;*
>
> *(c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.*
>
> *2. The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended"*[3].

3. Como notó la Corte Interamericana de Derechos Humanos[4] y el profesor Simma en sus alegatos ante la Corte Internacional de Justicia[5], el mencionado artículo ofrece en resumen dos derechos distintos: el derecho para el nacional a la asistencia consular y el derecho a que el Consulado puede comunicar libremente con su nacional detenido. Sin embargo, en la práctica muchos Estados se

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[3] Es interesante señalar que las mismas disposiciones se encuentran en los siguientes instrumentos internacionales: International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Standard Minimum Rules for the Treatment of Prisoners, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live, Rules covering the detention of persons awaiting trial or appeal before the Tribunal [Yugoslavia War Crime] or otherwise detained on the authority of the Tribunal, United Nations Rules for the Protection of Juveniles Deprived of their Liberty, Convention on Offences and Certain other Acts Committed on Board Aircraft, 1997 International Convention for the Suppression of Terrorist Bombings, 1973 Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents, Protocol against the Smuggling of Migrants by Land, Sea and Air supplementing the United Nations Convention against Transnational Organized Crime, Convention on the Safety of United Nations and Associated Personnel, 1979 International Convention against the taking of hostages, 1999 International Convention for the Suppression of the Financing of Terrorism, 1971 Convention for the suppression of unlawful acts against the safety of civil aviation, Draft International Convention for the suppression of acts of nuclear terrorism, Draft Comprehensive Convention on International Terrorism.

[4] El Derecho a la Información sobre la Asistencia Consular en el marco de las Garantías del Debido Proceso Legal, Opinión Consultiva OC-16/99, 1/10/1999, Serie A #16, 1999.

[5] Sentencia sobre el fondo, *Alemania vs Estados Unidos*, 27/6/2001, (el caso es referido como "*LaGrand*" del nombre de los condenados alemanes objeto de la reclamación de Alemania).

"olvidan" de informar al extranjero arrestado[6]. La cuestión surgió especialmente en relación con los extranjeros condenados en los Estados Unidos a la pena de muerte. Si la problemática existe desde hace tiempo, su relevancia se acentuó a partir del momento en que varios países decidieron iniciar una acción ante la Corte Internacional de Justicia por la violación de lo dispuesto en la Convención de Viena.

La rebelión contra los Estados Unidos

4. Paraguay fue el primer Estado en iniciar una acción ante la Corte Internacional de Justicia sobre el fundamento del Protocolo I de la Convención de Viena – que prevé que en caso de controversia sobre la interpretación del instrumento la Corte Internacional de Justicia tiene competencia para resolverla - pidiendo medidas precautorias para obtener la suspensión de la ejecución de su nacional; una vez logrado este objetivo[7], Paraguay buscó en vano obtener la ejecución de la orden internacional ante la Suprema Corte de los Estados Unidos[8]. El nacional fue ejecutado, por lo cual Paraguay retiró su acción del registro de la Corte internacional.

5. Tres años después, Alemania también buscó obtener la suspensión de la ejecución de su nacional ante la Corte internacional[9], y como Paraguay, falló ante la Suprema Corte americana[10] en obtener la ejecución de las medidas provisionales ordenadas por la Corte de La Haya consistiendo en suspender la ejecución hasta la sentencia definitiva sobre meritos. Sin embargo, al contrario de Paraguay, Alemania continuó con su acción ante los jueces internacionales con el fin de obtener la reparación de su perjuicio. Y sus esfuerzos

[6] Por razones de estilo, utilizaremos los términos "detenido" y "arrestado" como sinónimos, sin tomar en consideración la posibilidad que en los varios sistemas jurídicos, hay diferencias entre la detención y el arresto.

[7] Orden sobre medidas provisionales, *Paraguay vs United States of America*, 9/4/1998.

[8] Breard vs Greene, 14/4/1998.

[9] Orden sobre medidas provisionales, *Germany vs United States of America*, 3/3/1999.

[10] Germany vs United States of America, 1999.

valieron la pena en la medida que la Corte mundial condenó a los Estados Unidos por la violación de la Convención de Viena[12].

6. Con base en tal precedente, México – ¡más vale tarde que nunca! - ratificó el Protocolo adicional en abril de 2002, con el fin de presentar su acción el 9 de enero de 2003 para obtener, en una primera fase, medidas precautorias[13], y, en una segunda fase, la reparación de su perjuicio[14]. Y dos veces México obtuvo éxito. Además, por su pertenencia a la Organización de los Estados Americanos (OEA), México también pidió dos avisos consultivos[15], ambos redactados en los mismos términos, ante la Corte Interamericana de Derechos Humanos.

Puente cultural e inmigración permanente

7. Se puede decir que en el espíritu de la Convención de Viena, el consulado interviene como un “puente cultural”[16] entre el extranjero detenido y las autoridades locales[17]. Sin embargo, tal función se pierde seguramente entre la verdad sociológica y la ficción de la

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[12] Germany vs United States of America, meritos, 27/6/2001.

[13] Orden sobre medidas provisionales, *México vs United States of America*, 5 de febrero de 2003.

[14] Sentencia sobre el fondo, *México vs United States of America*, 31/3/2004, (el caso es referido como “*Avena*” del nombre del primer condenado objeto de la reclamación de México).

[15] *El Derecho a la Información precitado*; *Condición Jurídica y Derechos de los Migrantes Indocumentados*, Opinión Consultiva OC-18/03, 17/9/2003, Serie A, #18, 2003.

[16] Counter-Memorial of the United States in the Avena case, p. 71.

[17] Como lo mencionó la Corte de Apelación de Ohio: “*We note that if the Vienna Convention had been complied with in this case, the errors detailed in appellant's first assignment of error [a Miranda violation] would have been avoided. First, a competent translator would have been present to ensure that appellant's rights were not violated. Second, the American legal system would have been explained to appellant who, as a Mexican national, had not been exposed to nuances of our justice system the way that most Americans are through the intense media saturation that exists in this country. Finally, the Mexican consul could have assisted in tracking down potential witnesses who had returned to Mexico between the time of the incident and the time of trial*” (citado por James, *Effective Representation of Foreign Nationals in U.S. Criminal Cases, International Justice Project,* p. 28, http://www.internationaljusticeproject.org/nationalsResources.cfm)

nacionalidad. Así, en el asunto *Avena* al menos 46 de los 54 mexicanos vivieron varios años en los Estados Unidos y muchos de ellos ya fueron al menos arrestados una vez antes. En otras palabras, esos "extranjeros" conocen el sistema judicial americano y unos son *de facto* estadounidenses porque emigraron a los dos o tres años de edad y ya no recuerdan su origen mexicano. Visto así, sería ilógico que después de diez o veinte años "redescubran" su nacionalidad (es así que hasta al final, los hermanos LaGrand nunca realmente supieron que tuvieron la nacionalidad alemana). Sin embargo, se olvida que la nacionalidad no pertenece al individuo sino al Estado que unilateralmente determina quien es y quien no es su nacional[18]. Es un hecho que la nacionalidad mexicana es irrenunciable[19] y aunque ya estén en los Estados Unidos su nacionalidad persiste y consecuentemente son "extranjeros" en el territorio americano. Sin embargo, los Estados Unidos tienen la posibilidad de "nacionalizar" los inmigrantes mexicanos si quieren resolver, entre otros, el problema de la aplicación de la Convención de Viena, porque el hecho es que el instrumento internacional se aplica exclusivamente con la conexión de la nacionalidad y no en función de la estancia más o menos larga del extranjero en el país de recepción.

8. Sea lo que fuere, es un hecho que las disposiciones de la Convención de Viena no son siempre respetadas (Titulo I), perjudicando así el derecho de los Estados parte a la Convención como también los derechos de las personas condenadas sin haber podido contactar a su consulado (Titulo II).

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[18] CPJI, *Décrets de nationalité en Tunisie et au Maroc*, aviso, 7/2/1923, serie B, n° 4; Convención de La Haya del 12 de abril de 1930; CIJ, *Nottebohm*, 6/4/1955.

[19] Art. 37 (A) de la Constitución Política de los Estados Unidos Mexicanos.

Título I
El incumplimiento de las obligaciones de la Convención de Viena

9. En la medida que la jurisdicción obligatoria de la Corte Internacional de Justicia es facultativa[26], los redactores de la Convención de Viena sobre Relaciones Consulares promovieron un protocolo adicional a la Convención estableciendo la competencia de la Corte para las controversias en relación con la mencionada Convención. En este sentido, Paraguay, Alemania y México demandaron a los Estados Unidos de América ante la Corte Internacional para obtener satisfacción por el incumplimiento de las obligaciones internacionales por parte de los Estados Unidos. Las tres órdenes sobre medidas provisionales y las dos sentencias sobre el fondo constituyen hoy en fecha una jurisprudencia bien establecida (Sección 1).

10. La necesidad de promover las mencionadas acciones internacionales se explica en parte por la actitud de los tribunales americanos que no quisieron – y aún no quieren – sancionar a su país por el no respeto de los tratados internacionales. El análisis de estas decisiones, sin embargo, permite establecer las bases de ciertas soluciones aplicables en futuros casos (Sección 2).

[26] Sobre esta cláusula facultativa de jurisdicción obligatoria, véase Seara Vázquez, *Derecho Internacional Público*, 18˚ ed., Porrúa, 2000, p.331.

Sección 1: La jurisprudencia internacional

11. Los fallos de la Corte Internacional de Justicia aportaron muchas enseñanzas sobre la aplicación de la Convención de Viena, que sea sobre los aspectos procesales (A) o que sea sobre el contenido sustancial de sus reglas (B).

A – Aspectos procesales

12. Las acciones iniciadas ante la Corte mundial fueron la oportunidad para los Jueces de La Haya de precisar en que momento se agotan los recursos internos (a), si el *estoppel* permite constituir una defensa sólida (b), y eliminar la duda sobre la naturalaza jurídica del recurso internacional, precisando que la Corte Internacional de Justicia no actúa como una corte de apelación criminal (c).

a) El agotamiento de los recursos internos.

13. En *Avena*, los Estados Unidos se opusieron a la acción de México sobre el principio de que los nacionales mexicanos aún no habían agotado los recursos internos según la *local remedies rule* y que consecuentemente México no podría ejercer la protección diplomática en su favor. Si bien es cierto que la regla del agotamiento de los recursos en derecho interno es un principio bien establecido en derecho internacional[27], es también verdad que no se necesita el agotamiento de estos recursos, cuando son "obviamente inútiles" o "manifiestamente ineficaces"[28], y eso, por ejemplo, en presencia de una "jurisprudencia constante"[29] que no toma en cuenta la violación

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[27] CIJ, Elsi, 10/7/1989; Cançado Trindade, The Application of the Rule of Exhaustion of Local Remedies in International Law, Cambridge, 1983; Amerasinghe, Local Remedies in International Law, Cambridge, 1990.

[28] Tribunal Arbitral, *Debenture Holders of San Marco Co*, 1931, 5 *RIAA* 191-198; Sorensen, *Manual de derecho internacional*, FCE, 1994, 9.39.

[29] CPJI, *Panevezys-Saldutiskis Railway*, 28/2/1939, Ser. A/B, #76, p.18.

alegada. En otras palabras, "no puede haber obligación de agotar justicia cuando no hay justicia que agotar". Sin embargo, la Corte internacional eligió otra vía para establecer su competencia. En efecto, los jueces internacionales distinguieron entre los derechos individuales y el derecho de México *i.e.* que México reclama la reparación de su derecho propio. Este último consagrado por el artículo 36.1 (b) fue violado "directamente y a través de sus nacionales". A tal solicitud de reparación no se aplica la regla del agotamiento de los recursos internos porque se trata de una "pura" reclamación interestatal. Sin embargo, tal conclusión a primera vista carece de consecuencias sobre el *locus standing* de los Estados de origen ante los tribunales del Estado de recepción. En efecto, si estamos en presencia de una mera controversia interestatal entonces es lógico considerar que los Estados de origen no podrían presentar una acción para la ejecución coactiva de la sentencia internacional en el orden jurídico del Estado de recepción. No obstante, no compartimos tal posición; en realidad, se puede considerar que los Estados de origen tienen la opción entre presentar su acción ante un tribunal internacional o un tribunal local, la primera acción no siendo exclusiva de la segunda[30].

b) El "estoppel "

14. Tal como en *LaGrand*, los Estados Unidos han también argumentado en *Avena* que la acción tiene que ser declarada inadmisible en la medida que México nunca o de manera muy tardía llamó la atención de los Estados Unidos sobre las violaciones de los derechos consulares. Aunque no se utilizó el término de "*estoppel"*[31], la idea

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NB: Las sentencias de la Corte Permanente de Justicia Internacional y de la Corte Internacional de Justicia serán citadas de manera indistinta en inglés o en francés, los dos idiomas siendo los idiomas oficiales de trabajo de la Corte.

[30] *Infra* #99.

[31] Según el Black Law Dictionnary, el "estoppel" se define como sigue: 1. A bar that prevents one from asserting a claim or right that contradicts what one said or done before or what has been legally established as true; 2. A bar that prevents the relitigation of issues; 3. An affirmative defense alleging good-faith reliance on a misleading representation and an injury or detrimental change in position resulting from that reliance (7˚ ed., West Group, 2000.452). En el caso del Templo de Préah Vihéar (CIJ, 15/6/1962), el Juez Alfaro, en su opinión individual, explicó que la noción refleja en realidad tres principios romanos, a saber el principio de no contradicción - allegans contraria non audiendus est; el principio de no contradicción en perjuicio de otro - nemo postest mutare concilium suum in alterius injuriam; la inadmisibilidad de la contradicción - venire contra factum proprium non valet.

aparece detrás del argumento. En efecto, si el Estado de origen sabe de las presupuestas violaciones pero no toma ninguna acción, se puede presumir que o el Estado no considera que en realidad hay violación de una obligación internacional o, de manera discrecional determina que la violación no es tan grave como para intervenir a favor de su nacional. Admitido como principio general en el caso del *Templo Préah Vihéar*[32], la Corte de La Haya no obstante precisó en el fallo *ELSI*[33] que el estoppel no puede presumirse en presencia de una mera evocación de hechos, sino tiene que ser comprobado de manera positiva. Al argumento americano, la Corte recuerda que en el asunto *Tierras de fosfato*[34] estableció que tal tardanza puede rendir una acción inadmisible, precisando no obstante en el mismo fallo que no existe en derecho internacional plazos determinados. Además, según la Corte, la afirmación de los Estados Unidos no es tan cierta en vista de las pruebas que presentó México sobre las diversas acciones que tomó para llamar la atención de los Estados Unidos.

15. Aunque conceptualmente, no se trata de la noción de *estoppel*, pero parte de la misma estrategia de utilizar ciertos hechos o comportamientos de la contraparte para salirse del procedimiento, los americanos también sugirieron que las demandas de Alemania y de México tendrían que ser improcedentes en virtud de una cierta no-reciprocidad – quiere decir el principio general del *inadimplenti non est adimplendum* -, porque, según ellos, Alemania y México tampoco no respetan los derechos consulares. Sin embargo, como lo dice la Corte, la inejecución de una parte no implica la justificación de la omisión de cumplir con su obligación internacional para la otra parte, salvo si hay la prueba de una violación *sustancial* por parte del otro Estado, que entonces permite invocar la regla del *non adimpleti contractus* tal y como está codificado por el artículo 60 de la Convención de Viena sobre el Derecho de los Tratados. En realidad, el argumento como fue presentado por los Estados Unidos no pudo tener éxito en la medida que el *non adimpleti contractus* no es causa de inadmisibilidad sino una defensa para justificar la suspensión o el

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[32] 15/6/1962.

[33] 10/7/1989.

[34] *Certain Phosphate Lands in Nauru* (Nauru vs Australia), 26/6/1992.

retiro de un tratado internacional[35]. Los Estados Unidos nunca sostuvieron que quisieran salirse del instrumento internacional; al contrario, admitieron *expresis verbis* que la Convención de Viena aun está en vigor y les vincula.

c) La apelación "internacional"

16. En el orden de medidas provisionales solicitado por Paraguay, es interesante extrapolar el *obiter dictum* de los Jueces de La Haya que precisó que no le pertenece a la Corte internacional el pronunciarse sobre la legitimidad o no de las entidades federativas de aplicar la pena de muerte y que, de todas maneras, la Corte no es una "corte de apelación criminal" sino una corte cuya función es de resolver controversias entre Estados, *inter alia*.

17. Este argumento reveló más tarde ser una caja de Pandora. En efecto, en el asunto *LaGrand*, los Estados Unidos lógicamente utilizaron el *obiter dictum* mencionado anteriormente para sostener que Alemania no quiere resolver un litigio interestatal sino que busca una "apelación" ante la Corte internacional para "rectificar" la sentencia americana en contra de los hermanos Lagrand. Si es verdad que los tribunales internacionales se vuelven más y más en una "instancia de apelación", como se puede ver en relación con la Corte Europea de Derechos Humanos, *in casu* la Corte internacional rechaza tal afirmación y precisa de manera muy clara que su competencia consiste exclusivamente en la resolución de una controversia entre Estados en relación con la interpretación y la aplicación de la Convención de Viena. No obstante, el mismo argumento fue presentado una vez más - aunque también en vano - en el caso *Avena*, en donde los Estados Unidos solicitaron de nuevo la incompetencia de la Corte de oír el caso[36] por la razón que México estaría pidiendo juzgar "el tratamiento de los mexicanos en el sistema judicial federal y local americano y de juzgar el sistema criminal americano, y que

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[35] Daillier & Pellet, *Droit international public*, 6° éd., Paris, LGDJ, 1999, # 141. Véase también: CIJ, *Gabcikovo-Nagymaro* (Eslovaquia/Hungaria), 25/9/1997.

[36] Es interesante hacer notar que el mencionado argumento fue para los Estados Unidos causa de inadmisibilidad en el procedimiento *LaGrand* y causa de incompetencia en el asunto *Avena*.

consecuentemente la Corte no tiene tal poder bajo el amparo del artículo 1 del Protocolo adicional". Sin embargo, la Corte rechazó el argumento en la medida que para juzgar el cumplimiento o incumplimiento de las obligaciones internacionales, la Corte tiene que tener la facultad de examinar las acciones de las cortes nacionales en respecto a la aplicación del derecho internacional (las sentencias nacionales siendo meros hechos sin ninguna autoridad con respecto a las jurisdicciones internacionales[37]), conduciendo así a la competencia de la Corte de examinar los argumentos sobre los meritos.

B – Aspectos sustanciales

18. Sobre el fondo, pertenece a la Corte Internacional de Justicia verificar la existencia de un hecho ilícito[38] (a) para después ordenar los medios de reparación del perjuicio (b).

a) El hecho ilícito

19. En un primer lugar se debe comprobar la violación de una obligación internacional (1) antes de examinar si no hay causas justificadas para la exoneración de la responsabilidad internacional (2).

1. Constancia de las violaciones

20. Si no cabe duda de que un extranjero que no fue informado constituye una base sólida para una acción ante la Corte mundial por parte de su Estado nacional (i), es también cierto que el hecho de que un extranjero que fue informado pero mucho tiempo después de su arresto, puede ser también causa de una reclamación por la violación de la obligación internacional del Estado de recepción (ii).

i) El extranjero no informado

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[37] Véase por ejemplo en el marco del TLCAN: *Loewen*, Arb (AF)/98/3, 26/6/2003 (Mason, Mikva, Mustill).

[38] Sobre la teoría general del hecho ilícito véase Conforti, *Diritto internazionale*, 5° ed., Napoli, Editoriale Scientifica, 1999.345 *sq*.

21. Los Estados Unidos han sostenido en el asunto *Avena* que la obligación del artículo 36 de la Convención de Viena no se aplica si la persona arrestada no es un extranjero o si tiene más de una nacionalidad pero que una de estas es la nacionalidad del Estado de recepción. El problema técnico consiste en el saber quién tiene la carga de la prueba de la nacionalidad. El principio es el del *actor incumbit probatio* quiere decir el que invoca el argumento tiene que comprobarlo[39]. *In casu*, los Estados Unidos no supieron demostrar los elementos base de su pretensión y la Corte por lo tanto no indicó la solución en caso de doble nacionalidad del detenido. Sin embargo, es a observar que México no impugnó la posición sostenida por Estados Unidos y se puede concluir lógicamente que está aceptando de manera común que el precitado artículo 36 no se aplica si la persona detenida tiene al menos la nacionalidad del Estado de recepción; solución que parece corresponder al derecho positivo, especialmente con respecto a las soluciones en materia de acciones en protección diplomática en relación con particulares con doble nacionalidad. Así, el *dictum* tradicional del caso *Canevaro* establece que un Estado que tiene el particular por su nacional tiene el derecho legítimo de no tomar en consideración su otra nacionalidad[40]. Pero si no se trata de un nacional, el extranjero tiene que ser informado "sin dilación", noción que no está definida en la Convención de Viena.

ii) El extranjero no informado "sin dilación"

22. Ni en *Breard*, ni en *LaGrand* y *Avena* los Estados Unidos negaron la violación de su obligación de informar a la persona arrestada de sus derechos consulares y de su obligación de notificar el consulado del Estado nacional. Sin embargo, en este último caso, unos nacionales mexicanos fueron informados, pero mucho tiempo después, como por ejemplo unos 16 meses después del arresto. En las solicitudes de los avisos 16 y 18, México ha requerido a la Corte Interamericana de Derechos Humanos que interprete si la noción "sin dilación" significa que "todo extranjero detenido tiene que ser informado de los derechos que le confiere el propio artículo 36.1.b), en el momento del arresto y en todo caso antes de que el detenido rinda cualquier declaración o confesión ante las autoridades policíacas o judiciales".

[39] CIJ, *Nicaragua vs E.U.*, sentencia sobre jurisdicción, 1984, # 101.

[40] Tribunal Arbitral, 3/5/1912, *RSA* 11, p. 405.

Tomando en cuenta que la consulta mexicana se hizo en particular con respecto a nacionales condenados a la pena de muerte, la Corte precisó que el artículo 36.1.b) de la Convención de Viena no establece distinción alguna con base en la gravedad de la pena aplicable al delito que origina la detención. Según los jueces de San Andrés, a este respecto, "es revelador que el artículo citado no exige que se informe al funcionario consular sobre las razones que determinaron la privación de libertad. Al acudir a los respectivos trabajos preparatorios, este Tribunal ha constatado que esto es resultado de la voluntad expresa de los Estados Partes, algunos de los cuales admitieron que revelar al funcionario consular el motivo de la detención constituiría una violación del derecho fundamental a la privacidad. El artículo 36.1.b) tampoco hace distinción alguna en razón de la pena aplicable, por lo que es natural deducir que este derecho asiste a cualquier detenido extranjero".

23. Dilucidado este aspecto de la pregunta, la Corte continuó con la historia legislativa del mencionado artículo y constó "que se desprende que la obligación de informar "sin dilación" al detenido del Estado que envía sobre los derechos que le confiere dicho precepto fue incluida, a propuesta del Reino Unido y con el voto afirmativo de una gran mayoría de los Estados participantes en la Conferencia, como una medida que permite asegurar que el detenido esté consciente, en forma oportuna, del derecho que le asiste de solicitar que se le notifique al funcionario consular sobre su detención para los fines de la asistencia consular. Es claro que éstos son los efectos propios (*effet utile*) de los derechos reconocidos por el artículo 36. Por lo tanto, y en aplicación de un principio general de interpretación que ha reiterado en forma constante la jurisprudencia internacional, la Corte interpretará el artículo 36 en forma tal que se obtenga dicho "efecto útil". En consecuencia, para establecer el sentido que se le corresponde dar al concepto "sin dilación", se debe considerar la finalidad a la que sirve la notificación que se hace al inculpado. Es evidente que dicha notificación atiende al propósito de que aquél disponga de una defensa eficaz. Para ello, la notificación debe ser oportuna, esto es, ocurrir en el momento procesal adecuado para tal objetivo. Por lo tanto, y a falta de precisión en el texto de la Convención de Viena sobre Relaciones Consulares, la Corte interpreta que se debe hacer la notificación al momento de privar de la libertad al inculpado y en todo caso antes de que éste rinda su

primera declaración ante la autoridad".

24. La misma cuestión se presentó ante la Corte Internacional de Justicia en el procedimiento iniciado por México. Como base de interpretación, la Corte invocó la regla consuetudinaria tal como está codificada por los artículos 31 y 32 de la Convención de Viena sobre el Derecho de los Tratados, y concluye, al contrario de la Corte Interamericana de Derechos Humanos, que no puede decirse que el término "sin dilación" tiene que ser entendido como "inmediatamente al momento del arresto y antes de la interrogación"[41]. En realidad, según la Corte de La Haya, "sin dilación" se debe entender con respecto a la constancia de la nacionalidad extranjera del individuo. En otras palabras, la autoridad tiene que informar al extranjero de sus derechos consulares a partir del momento que sabe – o que ¡sospecha! - que es un extranjero, poco importa que sea tal cual al momento del arresto o del interrogatorio o después. Es así que la Corte toma en cuenta las dificultades prácticas. En efecto, se puede ocurrir que la persona arrestada clama ser americana aunque no lo es; o al contrario, puede pretender ser extranjera y en realidad es ciudadano estadounidense. La determinación de la nacionalidad puede tomar tiempo siendo las verificaciones trámites administrativos. Sin embargo, de cierta manera la Corte se contradice en la medida que establece que la obligación de informar tiene que ser cumplida ¡también en presencia de una simple sospecha! Si la sospecha es suficiente, entonces no importa la determinación de la nacionalidad y el resultado final de la investigación. En ambas hipótesis, en que el extranjero pretende ser de otra nacionalidad, la información de sus derechos consulares no perjudican a los Estados Unidos, que la pretensión sea correcta o no; lo mismo en la situación contraria. Y al final de cuentas, tal es la posición de la Corte cuando,

[41] 86. The Court further notes that, notwithstanding the uncertainties in the travaux préparatoires, they too do not support such an interpretation. During the diplomatic conference, the conference's expert, former Special Rapporteur of the International Law Commission, explained to the delegates that the words "without undue delay" had been introduced by the Commission, after long discussion in both the plenary and drafting committee, to allow for special circumstances which might permit information as to consular notification not to be given at once. Germany, the only one of two States to present an amendment, proposed adding "but at latest within one month". There was an extended discussion by many different delegates as to what such outer time-limit would be acceptable. During that debate no delegate proposed "immediately". The shortest specific period suggested was by the United Kingdom, namely "promptly" and no later than "48 hours" afterwards. Eventually, in the absence of agreement on a precise time period, the United Kingdom's other proposal to delete the word "undue" was accepted as the position around which delegates could converge. It is also of interest that there is no suggestion in the travaux that the phrase "without delay" might have different meanings in each of the three sets of circumstances in which it is used in Article 36, paragraph 1 (b).

después de haber afirmado que la obligación no impone ser cumplida al momento del arresto, que sería "deseable que las autoridades policíacas sistemáticamente informan las personas detenidas de los derechos consulares" al momento de la lectura de los famosos derechos "Miranda"[42]; acción simple que no costaría mucho al contribuyente americano y permitiría evitar muchas injusticias. Y si la notificación no es "inmediatamente" al momento de la detención, esta no obstante tiene que intervenir antes del primer interrogatorio.

25. Tal es, al menos en el papel, la situación en México en donde el artículo 128 fracción IV del Código Federal de Procedimientos Penales prevé que al momento del arresto, el extranjero tiene que ser informado tanto de sus derechos como del derecho de comunicarse con su consulado. Sin embargo, según las declaraciones de los Estados Unidos en relación con sus nacionales detenidos en México, en realidad esa notificación interviene sólo después del interrogatorio. Con respecto a otros países, según las cifras provistos por los defensores americanos en el asunto *Avena*, de 79 países, solamente 45 informan a los nacionales americanos sobre sus derechos consulares, y de estos últimos 27 Estados informan al extranjero de sus derechos consulares sólo después el interrogatorio, como es el caso en México, mientras que solamente 8 notifican a la persona concernida inmediatamente después la detención.

2. Rechazo de los medios de defensa

26. En sus memorias, los Estados Unidos han presentado tres defensas de valor in-igual en la medida que sostuvieron que la estructura federal no permite siempre respetar la Convención de Viena (i) y que las reglas internas del *procedural default* derogan a una aplicación retroactiva de la Convención (ii). El último argumento de peso de los Estados Unidos consistió en invitar a la Corte Internacional de tomar en cuenta que aunque los sentenciados pudieron ser informados de sus derechos, el hecho no hubiera cambiado nada sobre el fondo en la medida que no había dudas, según los Estados Unidos, sobre su culpabilidad de los condenados (iii).

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[42] Se trata de informar a la persona arrestada que tiene, entre otros, el derecho de tener un abogado y que todo lo que diga puede ser utilizado en su contra en la corte (para el origen de la práctica, véase *Miranda vs. Arizona,* 384 U.S. 436 (1966), *in*: Graham*, Lectures of the Legal System of the United States,* 2 ˚ed., FLDM, 2004.76.

i) La inadmisibilidad del argumento de la estructura federal

27. En sus consultas, México solicitó a la Corte Interamericana de Derechos Humanos que interpretara si tratándose de países americanos constituidos como Estados federales que son Parte en el Pacto de Derechos Civiles están obligados a garantizar la notificación oportuna a que se refiere el artículo 36.1.b) de la Convención de Viena y a adoptar disposiciones conforme a su derecho interno para hacer efectiva en tales casos la notificación a que se refiere ese artículo en todas sus partes componentes, si el mismo no estuviese ya garantizado por disposiciones legislativas o de otra índole, a fin de dar plena eficacia a los respectivos derechos y garantías consagrados en el Pacto.
28. Corresponde a la Corte de San Andrés de contestar que si bien la Convención de Viena no contiene una cláusula relativa al cumplimiento de las obligaciones por parte de los Estados federales (como sí lo disponen, por ejemplo, el Pacto Internacional de Derechos Civiles y Políticos y la Convención Interamericana de Derechos Humanos), esta Corte ya ha establecido que "un Estado no puede alegar su estructura federal para dejar de cumplir una obligación internacional" [43] . Asimismo, de conformidad con el artículo 29 de la Convención de Viena sobre el Derecho de los Tratados, "[u]n tratado será obligatorio para cada una de las partes por lo que respecta a la totalidad de su territorio, salvo que una intención diferente se desprenda de él o conste de otro modo".[44]**.** La Corte consta que de la letra y espíritu de la Convención de Viena sobre Relaciones Consulares no se desprende la intención de establecer una excepción a lo anteriormente señalado. Por lo tanto, la Corte concluye que en ausencia de una excepción *expresis verbis* en la Convención de Viena sobre Relaciones Consulares, la regla general de la Convención de Viena sobre el Derecho de los Tratados se aplica[45]**,** obligando al Estado de cumplir con sus obligaciones

[43] *Garrido y Baigorria, Sentencia sobre la indemnización,* 27/8/98, Serie C, # 39; *Cf* también*:* Comisión de reclamaciones franco-mexicana, *Sucesión de Hyacinthe Pellat*, d7/6/29, *RIAA*, vol. V, p. 536. Para una opinión contraria sobre la base del derecho constitucional americano: Bradley & Goldsmith, The Abiding Relevante of Federalism to U.S. Foreign Relations, *AJIL*, 1998.675.

[44] Daillier & Pellet, *op.cit*, # 141.

[45] A señalar que los Estados Unidos no son parte a la Convención sobre el Derecho de los Tratados, hecho que podría poner en duda su aplicación en el presente caso. Sin embargo, la regla mencionada es también una regla consuetudinaria que liga a los Estados Unidos. En efecto, como lo declaró la Corte internacional en el fallo precitado *Gabcikovo*, la Convención de Viena sobre el Derecho de los Tratados codifica numerosas reglas consuetudinarias (*Gabcikovo-Nagymaro* (Slovacia/Hungaria), 25/9/1997).

internacionales independientemente de su estructura federal o unitaria. Y en este sentido, la doctrina de derecho interno del *procedural default* tampoco puede prevalecer.

*ii) La inadmisibilidad del argumento del "*procedural default"

29. La regla del "*procedural default*"[46] es definida como,

> *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,

30. consagrando así un *estoppel* procesal[47]**.** Eso implica que no es posible obtener un procedimiento federal a menos que se compruebe una "causa" que explique porque el sentenciado no presentó anteriormente el argumento y cuál es el "perjuicio" por no haber presentado el argumento[48]. Como lo explicó el cuarto Circuito, "cualquier abogado serio busca los tratados y conoce los medios ofrecidos por ellos, e incumbe a él de invocarlos ante los tribunales"[49]. Sin embargo, ¡es bastante difícil entender por qué una persona no "especialista en leyes" tendría que pagar la cuenta por un abogado incapaz e inculto!

31. En *LaGrand*, la Corte precisó que es menester distinguir dos hipótesis bien diferentes, a saber, por una parte la existencia *in abstracto* de la regla, y, por otra parte, su aplicación *in concreto*. En sí mismo, la regla no viola el artículo 36 de la Convención de Viena y es lógico porque el *procedural default* parte del principio del *Nemo auditur propiam turpitudinem allegans*; si el sentenciado hubiera podido invocar el argumento en primera instancia, ¿por qué no lo hizo? La regla es de cierta manera universal y está especialmente consagrada en el sistema de la Convención Europea de los Derechos Humanos. Sin embargo, la aplicación del precepto en los casos presentados ante la Corte internacional, no puede justificar la

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[46] Para su origen, véase *infra* 68.

[47] *Supra* 31.

[48] *Coleman vs Thompson*, 501 U.S. 722 (1991). Véase también: *Breard vs Pruett*, 523 U.S. 371 (1998).

[49] *Murphy vs Netherland*, 116 F. 3 ed. 97, 100 (4th Cir. 1997).

violación de la obligación internacional porque *in casu* impidió a los sentenciados alemanes y mexicanos invocar sus derechos consulares como base de una acción en revisión de sus procedimientos.

32. Aunque el argumento no fue presentado tal cual en los varios procedimientos internacionales, es importante destacar que en casi todos los casos, la violación de los derechos consulares no es invocada en las primeras instancias porque el abogado defensor ¡no la conoce! La poca ciencia de los abogados en materia de tratados internacionales explica las deficiencias y en este sentido, es injusto utilizar esta deficiencia en contra del condenado, además de que la doctrina del *procedural default* no lo exige tal cual como vamos a verlo más adelante[50], para no reparar la omisión del derecho a contactar al consulado que la Corte Interamericana de Derechos Humanos consagró como parte integral del *due process*, este último siendo un derecho humano fundamental a nivel internacional y un derecho constitucional en el orden jurídico americano. Y eso no obstante de que la omisión no ha perjudicado en nada al condenado con respecto a su sentencia final.

iii) La inadmisibilidad del argumento de la ausencia de efectos por la violación de la Convención

33. Los Estados Unidos, basándose sobre su propia jurisprudencia interna, *Arizona vs Fulminante*[51], argumentaron en su defensa contra Paraguay que la culpabilidad de Breard fue totalmente establecida, eso en particular por la presencia de una confesión explícita de su crimen. Cierto, los Estados Unidos reconocieron que Breard nunca fue informado de sus derechos consulares, pero que tal situación no fue creada de manera intencional. Además, el procedimiento penal se hizo con todas las garantías: que el sentenciado entendió perfectamente el inglés, y que tuvo abogado[52]. Por lo tanto, una eventual intervención de su consulado nacional no hubiera cambiado nada con respecto a la

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[50] *Infra* #72.

[51] 499 U.S. 279 (1991).

[52] Tal fue, una vez más, la posición del Juez Lumpkin en su opinión disidente en la decisión de la Corte de Apelación de Oklahoma sobre la posibilidad para Osvaldo Torres de presentar las pruebas sobre su perjuicio de no haber sido informado de sus derechos consulares (13/5/2004, No. PCD-04-442).

sentencia final. En *LaGrand*, una vez más, los Estados Unidos subrayaron que aunque los hermanos LaGrand hubieran tenido la posibilidad de contactar a su consulado, eso no hubiera cambiado nada en relación con la sentencia final. Y de todo modo, no se sabe si los hoy ejecutados hubieran contactado al consulado si hubieran sabido sus derechos consulares. La Corte internacional replica que no es necesario hacer especulaciones de lo que hubiera pasado o no en caso de una notificación de los derechos consulares. Lo que importa es que no fueron informados y que Estados Unidos no cumplió con su obligación en virtud de la Convención de Viena.

34. Sin embargo, parece que los Estados Unidos no entendieron el mensaje de la Corte y reiteraron el mismo argumento en el asunto *Avena*:

> *Although the [arresting] officer did not ask Hernández Llanas whether he wanted them to inform the Mexican Consulate of his arrest, it was certainly not unreasonable for him to assume that an escaped convict would not want the Consulate of the country from which he escaped notified of his arrest.*

La replica de la Corte se hizo de la siguiente manera:

> *The Court notes that the clear duty to provide consular information under Article 36, paragraph 1 (b), does not invite assumptions as to what the arrested person might prefer, as a ground for not informing him. It rather gives the arrested person, once informed, the right to say he nonetheless does not wish his consular post to be notified.*

35. Si los casos presentados ante la Corte mundial no implicaron muchas dificultades para constatar las violaciones, el interés legítimo de los demandantes en contra de los Estados Unidos consistió también en pedir la reparación del prejuicio sufrido.

b) La reparación del hecho ilícito

36. Una vez verificado que hay violación de la obligación internacional, se plantea la cuestión sobre la naturaleza de la reparación del perjuicio. El principio consiste en una reparación en lo integral (1), pero también existe la posibilidad de obtener una garantía de no repetición del hecho ilícito (2).

1. Restitutio in integrum

37. En la primera como en su segunda solicitud de aviso a la Corte Interamericana de Derechos Humanos, México preguntó, de manera reiterativa, a la Corte de San Andrés una interpretación sobre los efectos jurídicos de la imposición y ejecución de la pena de muerte en casos en que se no se han respetado los derechos reconocidos en el artículo 36.1.b) de la Convención de Viena sobre Relaciones Consulares. La Corte concluyó de manera lapidaria que las consecuencias jurídicas inherentes a una violación de una obligación internacional es la responsabilidad internacional del Estado y al deber de reparación, sin que se diera la pena de precisar en qué exactamente la mencionada reparación tendría que consistir.

38. El principio internacional es que la reparación tiene que efectuarse "en forma apropiada", apreciada *in concreto*[53], y que permita de ser posible obtener el *status quo ante*, permitiendo reestablecer la situación tal como estaba antes que se cometió la violación de la obligación internacional[54]. En el asunto *Breard*, los Estados Unidos argumentando que la ausencia de información sobre los derechos consulares no hubiera cambiado nada con respecto a la sentencia final[55], sugirieron que una disculpa oficial a Paraguay constituyera una reparación suficiente – basándose sobre su derecho jurisprudencial nacional que estimó a veces que la única reparación a la violación de la Convención de Viena consiste en "medidas políticas y diplomáticas"[56] -, y que cualquier otra "sanción" por la violación de la obligación internacional sería contraria a la práctica de los Estados y que, además podría ser considerada como un "precedente peligroso" abriendo la puerta a numerosos otros casos; argumento que obviamente no fue retenido por los jueces de La Haya.

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[53] CPJI, *Factory at Chorzów*, sentencia sobre jurisdicción, 26/7/1927, Serie A, #9, p.21.

[54] CPJI, *Factory at Chorzów*, sentencia sobre meritos, 13/9/1928, Serie A, #17, p.47.

[55] *Supra* #50.

[56] *Lombera-Camorlinga*, 206 F. 3d, 882, 887 (9th Cir. 2000).

39. Por su parte, en *LaGrand,* la Corte indicó que la reparación tiene que consistir en permitir la revisión del procedimiento tomando en cuenta las violaciones en todos los casos de las personas condenadas a "penas severas"o sujeto a "detenciones prolongadas". Sin embargo, la forma en como operar la revisión puede ser libremente determinada por los Estados Unidos, y que consecuentemente, al contrario de los argumentos de México, la anulación parcial o total de las sentencias pronunciadas no es el único remedio, permitiendo por ejemplo los procedimientos "administrativos" o "políticos" de perdón. Sin embargo, en relación con el presente punto, el Juez *ad hoc* Bernardo Sepúlveda[57] indicó en su declaración que:

> *There is a need to define the nature of the obligations imposed by the concept "by means of its own choosing". If the issue is not properly clarified by the Court, the two parties in the present case will not have a sufficiently solid legal guideline on the adequate measures to be undertaken in order to find the reparation sought by México and in order to comply with the remedy decided by the Court to relieve the United States of its responsibility. The settlement of this issue is necessary in order to deal with the consequences that arise by virtue of an internationally wrongful act. The responsible State has the duty to make full reparation for the injury caused by its wrongful act. To dispel any potential misunderstandings, there is a precedent that provides a guideline and that can be invoked in order to ensure a clear definition. The Permanent Court of International Justice found that there is a need 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 can not be again be called in question in so far as the legal effects ensuing there from are concerned" (Interpretation of Judgments, Nos. 7 and 8 (Factory at Chorzów), Judgment No. 11, 1927,P.C.I.J., Series A, No. 13, p. 20).*

> *79. The legal reasoning that compels the need for the cessation and non–repetition of a breach of an international obligation is the continued duty of performance. To extend in time the performance of an illegal act would frustrate the very nature and foundations of the rule of law. As the ILC, in Article 29 of its Draft Articles on State responsibility indicates, "The legal consequences of an international wrongful act . . . do not affect the continued duty of the responsible State to perform the obligation breached". In the Commentary to this Article, the ILC states: "Even if the responsible State complies with its obligations under Part Two to cease the wrongful conduct and to*

[57] Juez electo por México en virtud del artículo 31 del Estatuto de la Corte internacional.

> *make full reparation for the injury caused, it is not relieved thereby of the duty to perform the obligation breached. The continuing obligation to perform an international obligation, notwithstanding a breach, underlies the concept of a continuing wrongful act and the obligation of cessation." (A/56/10, p. 215, para. 2.).*

40. Es importante subrayar que la reparación del perjuicio no concierne solamente a los nacionales condenados a muerte, sino a todos aquellos condenados a penas "severas" como puede ser la perpetuidad. La apreciación de la pena tiene que ser hecha *in concreto*, tomando en cuenta varios factores como la posibilidad de reducción de la pena según las reglas locales o la posibilidad de salir "*on parole*" pudiendo beneficiarse de la libertad condicional. Por ejemplo, una condena de diez años puede ser considerada como una pena severa; sin embargo, si el condenado puede obtener la libertad condicional después de tres años, se puede presumir que la condena pierde su atributo de pena severa.

41. Siguiendo a la Corte Internacional, el remedio puede ser tanto una revisión judicial, como un procedimiento administrativo por ejemplo. Si embargo, es legítimo interrogarse si un procedimiento administrativo de perdón es realmente apto a reparar el perjuicio. En efecto, el perdón no elimina la condena. Sin embargo, muchas veces los sentenciados no quieren solamente salir de la cárcel, sino también obtener la rehabilitación integral, quiere decir una decisión judicial que declara su inocencia. En otras palabras, la revisión judicial del procedimiento es el único medio que permite obtener la reparación del perjuicio en todas sus dimensiones. De la misma manera, los fallos internacionales deben tener por consecuencia que en la actualidad ya no es posible para los tribunales estadounidenses de condicionar la revisión a que se demuestra un perjuicio debido a la no-notificación y comprobar que la asistencia consular hubiera cambiado el resultado del juicio[58]. En efecto, como lo hemos mencionado[59], no importa de lo que

[58] *United States vs Esparza-Ponce*, 7 F. Supp. 2d 1084 (S.D. Cal. 1998): "To establish prejudice, a defendant must show (1) he or she did not know of the right to contact a consul or official; (2) he or she would have taken advantage of the right had he or she known of it; and (3) the contact likely would have resulted in assistance to the defendant". El mismo razonamiento fue hecho por el Noveno Circuito en *United States vs Lombera-Camorlinga*, 25/3/99, AG 4076.

[59] *Supra* # 50 sq.

hubiera podido pasar, sino que se trata de constar la violación del artículo 36 de la Convención de Viena; y eso es todo. Y en este sentido la decisión del Presidente de los Estados Unidos de requerir a los tribunales norteamericanos de revisar los casos de los condenados a muerte mexicanos objeto de la sentencia *Avena* solo a condición que hay un perjuicio real y no probable[60] contraviene directamente lo que dijo Corte internacional cuando insistió que no es necesario hacer especulaciones de lo que hubiera pasado o no en caso de una notificación de los derechos consulares, lo que importa es que no fueron informados.

42. Si la revisión puede tener carácter de reparación de la violación de la obligación internacional, es también necesario asegurarse que tales hechos ilícitos no se reproduzcan en el futuro.

2. La no repetición del hecho ilícito

43. En la medida de que los hermanos LaGrand ya fueron ejecutados, gAlemania al contrario de Paraguay, buscó ante la Corte Internacional la obtención de parte de los Estados Unidos de la garantía de que lo que pasó no se repetiría en el futuro. Los Estados Unidos alegaron que ya tomaron medidas importantes para prevenir futuras violaciones de la Convención de Viena, reconociendo que este instrumento internacional es de primera importancia para ellos, en la medida que protege también a los americanos que viajan y viven fuera del territorio estadounidense. En este sentido, los Estados Unidos subrayaron que en 1998 publicaron unos 60,000 ejemplares de un libreto intitulado "*Consular Notification and Access: Instructions for Federal, State and Local Law Enforcement and Other Officials Regarding Foreign Nationals in the United States and the Rights of Consular Officials to Assist Them*", y que se desarrolló para los oficiales de policía unos 600,000 pequeños cartones en donde se resume los puntos a respetar; el todo complementado por varias series de capacitaciones a nivel federal y local[61].

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[60] Amicus curiae, *op.cit.*, p. 47.

[61] Es así que el Departamento de Estado creó una página Web sobre el tema, en donde se puede leer:

44. Sin embargo, para Alemania, tales iniciativas no fueron suficientes, porque desde 1998, fecha en donde los Estados Unidos empezaron la distribución del “material de información” otros alemanes fueron detenidos sin ser notificados de sus derechos consulares. Lo que se requiere realmente, es un cambio sustancial en la legislación y la práctica judicial americana.

45. No obstante, la Corte internacional consideró que el hecho para un Estado de declarar varias veces durante todo el procedimiento ante la Corte que “hará lo posible para cumplir con su obligación

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Here you’ll find official instructions for Federal, State, and Local law enforcement and other officials concerning the rights of Foreign Nationals in the United States. You’ll find information and guidance regarding:
· The arrest and detention of foreign nationals
· The deaths of foreign nationals
· The appointment of guardians for minors or incompetent adults who are foreign nationals
· Related issues pertaining to consular services to foreign nationals in the United States

All levels of law enforcement must ensure that foreign governments can extend appropriate consular services to their nationals in the U.S. and that the U.S. complies with its legal obligations to such governments. It is essential that U.S. citizens be offered the same consular services when they are detained abroad. To require that of other countries, we must be certain we provide this courtesy here. These instructions must be followed by all federal, state, and local government officials, whether law enforcement, judicial, or other, insofar as they pertain to foreign nationals subject to such officials' authority or to matters within such officials’ competence. Your cooperation in ensuring that foreign nationals in the United States are treated in accordance with these instructions permits the U.S. to comply with its consular legal obligations domestically and will ensure that the U.S. can insist upon rigorous compliance by foreign governments with respect to U.S. citizens abroad” (http://www.travel.state.gov/law/notify.html).

De la misma manera el Departamento de Justicia y el Instituto Nacional de Inmigración (INS) han implementado en sus reglas la obligación de informar al extranjero de sus derechos consulares (28 CFR §50.5 (a); 8 CFR § 236.1(e), disposiciones que se aplican también al FBI. Este último publicó en su boletín interno la importancia de respectar los derechos consulares al momento del arresto (Clark, Providing Consular Rights Warnings to Foreign Nationals, *FBI Law Enforcement Bulletin*, marzo 2002, p. 29).

A nivel estatal, California ya ha revisado su Código penal, implementando un nuevo artículo 834c) imponiendo como obligación para la policía de notificar los derechos consulares; también Florida (*Recognition of International Treaties Act* 1965, Chap. 901.26), y Oregon (*Revised Statutes 2003*, Chap. 181, Section 2, ORS 426.228 (9) (a). La policía de Nueva York (NYPD) subraya en su manual de procedimiento la importancia de la Convención de Viena, y la Procuraduría General de Texas emitió sobre la misma problemática el *Magistrate’s Guide to Consular Notification Under the Viena Convention*.

convencional", "entonces eso tiene que ser visto como la expresión de una voluntad de continuar en este sentido". Claro, que eso no puede impedir que otros casos de violación del Convenio de Viena pueden surgir en el futuro, sin embargo "ningún Estado puede garantizar que nunca más tal evento puede ocurrir". Consecuentemente, la voluntad de los Estados Unidos tal como fue expresada ante la Corte de cumplir con la Convención de Viena responde a la solicitud de Alemania de obtener garantías de no repetición del hecho ilícito.

46. Tres años después *LaGrand*, la Corte nota en el caso *Avena* que los Estados Unidos han sustancialmente mejorado su sistema de información y consecuentemente repite lo mencionado en *LaGrand* a saber, la declaración estadounidense ante la Corte de tomar todas las medidas necesarias para impedir violaciones futuras responde a la solicitud de México de obtener garantías de no repetición del hecho ilícito. Sin embargo, el punto interesante es el párrafo - que es difícilmente clasificable por el intérprete entre *ratio decidendi* y *obiter dictum* -, en el cual la Corte ¿declara?, ¿sugiere?, ¿recomienda? que no habría tantas violaciones de los derechos consulares si los Estados Unidos añadirían en el cartón "Miranda"[62] los derechos consulares.

47. Tal sugerencia tendría que ser también tomado en consideración por México. En efecto, el problema fundamental en materia de notificación de derechos consulares, es el de la identificación del extranjero. Si en México es fácil de reconocer físicamente y auditivamente a una persona como europeo o americano, tal no es el caso de los demás latinoamericanos. Su arresto tendría siempre que ser acompañado de tal información, sea sólo a título preventivo. Y es verdad que tal medida no tiene costo…y puede evitar malas sorpresas porque ¡no cabe duda lo que pasó a los Estados Unidos podría pasar mañana a México!

[62] Se trata de una pequeña tarjeta en donde el Policía puede leer a la persona arrestada sus derechos tal como lo hemos mencionado anteriormente (*supra* nota 44).

Sección 2: La jurisprudencia nacional

48. Si en el resultado los tribunales federales y locales no difieren de posición, es importante distinguir entre la jurisprudencia federal (A) y local (B) en relación con sus correspondientes argumentos.

A – La jurisprudencia federal

49. Es sobre la base de dos argumentos principales que los tribunales federales rechazan hasta ahora tomar en consideración las violaciones de la Convención de Viena; se trata por una parte de la doctrina del *procedural default* que se combina con la regla del *last-in-time* (a) y, por otra parte, de la repartición constitucional de las competencias federales y locales (b).

a) ***Procedural default* y *last-in-time rule***

50. En el último momento, después de haber solicitado los medios precautorios a la Corte Internacional de Justicia, Paraguay y Breard solicitaron ante la Suprema Corte de los Estados Unidos la suspensión de la ejecución programada. La Corte americana observó, según sus propios precedentes[63], el "derecho internacional reconoce que en ausencia de una disposición contraria se aplican las reglas procesales del Estado en relación con la aplicación del tratado" y que la propia Convención de Viena sobre Relaciones Consulares lo prevé[64]. El derecho positivo americano establece desde *Wainwright vs*

[63] Sun Oil Co. vs Wortman, 486 U.S. 717, 723 (1988); Volkswagenwerk Aktiengesellschaft vs. Schlunk, 486 U.S. 694, 700 (1988); Société Nationale Industrielle Aérospatiale vs United States, 482 U.S. 522, 539 (1987).

[64] El artículo 36.2 se lee así: 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.

El *in fine* sin embargo prevé la obligación de adoptar leyes procesales locales que dan pleno efecto a las disposiciones convencionales, quiere decir que ¡no es un mero reenvío al derecho interno, si no un reenvío condicionado!

Sykes[65] de manera general la doctrina del "*procedural default*", y desde 1996, el *Antiterrorism and Effective Death Penalty Act* (AEDPA) enuncia de manera especial la misma regla tratándose de violaciones de tratados internacionales.

51. Si es una regla absoluta de derecho internacional que éste es superior al derecho nacional[66], aún numerosos Estados optan para una posición contraria. Es cierto que los Estados Unidos reconocen *prima facie* la superioridad del tratado sobre la ley nacional, sin embargo, la adopción de la regla del *Lex posterior priori derogat*[67], permitiendo que una ley adoptada posteriormente a un tratado puede derogar al mencionado tratado, vacía el fundamento del principio. La llamada regla del *last-in-time*[68] en el caso *Breard* tuvo por consecuencia que los jueces consideraran que el AEDPA deroga a la Convención de Viena y que entonces el recurso de Breard tuviera que ser rechazado[69].

52. Sin embargo, en relación con esta postura de la Suprema Corte de los Estados Unidos, el Profesor Paust opinó:

> *A necessary precondition for application of the last-in-time rule is a showing that Congress had a clear and unequivocal intent to override the treaty in question.*[11] *It was never demonstrated that this was*

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[65] 433 U.S. 72 (1977).

[66] Taft, árbitro único, *Reino Unido vs Costa Rica*, 18/10/1923, *AJIL*, 1924.147; CPJI, 25/5/1926, *Intérêts allemands en Haute Silésie polonaise*, serie A, n° 7; *Greco-Bulgarian Communities*, opinion consultative, 31/7/1930, serie B, #17, p.32; *Traitement des prisonniers de guerre polonais à Dantzig*, 4/2/1932, serie A/B, n° 44; CIJ, *Appplicability of the Obligation to Arbitrate Under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, opinión consultativa, 26/4/1988; *Adde*: artículo 27 de la Convención de Viena sobre el Derecho de Tratados.

[67] *Whitney vs. Robertson*, 124 U.S. 190, 194 (1888).

[68] Vagts, The United States and Its Treaties: Observance and Breach, *AJIL*, 2001.313.

[69] Posición también adoptada por el Presidente de los Estados Unidos en su *Amicus Curiae* dirigido a la Suprema Corte en el caso *Medellin vs Dretke*, No. 04-5928, 2005.17.

> *Congress's intention in subsequently enacting the Antiterrorism Act.[12] Even if such an intent existed, the "rights under treaties" exception[13] to the last-in-time rule should have been applied. Similarly, the customary right to freedom from "denial of justice" should have been addressed and should have prevailed.[14]*
>
> *The per curiam opinion stated that international law requires "a clear and express statement to the contrary" or else "procedural rules of the forum state [will] govern implementation of" a treaty.[15] This statement reflects several misunderstandings: (1) evident confusion of conflicts principles[16] with international law; (2) a miserly misstatement of the law of treaties (especially the obligation to perform in good faith[17] and the rule that internal law may not be invoked as justification for a failure to perform[18]); (3) inattention to the role of customary law as interpretive background; and (4) inattention to the rule that treaties are to be construed liberally to protect express and implied rights.[19] Procedural guarantees under international law, including rights of access to courts, of communication with and assistance of consuls, and of an effective judicial remedy,[20] can certainly be implied. Express or implied, they must govern good faith implementation of a relevant treaty. Moreover, in this case a clear and express mandate contained in Article 36(2) of the treaty requires that domestic "laws and regulations must enable full effect to be given to the purposes" of the rights accorded in the treaty. Especially in view of such a mandate, it would be disingenuous to argue that domestic procedural rules can deny full effect to such treaty-based rights*[70].

53. Se debe también observar que la misma Corte suprema tampoco siempre es muy respetuosa de sus propias decisiones, y cuando quiere, invoca el derecho internacional en contra de una ley nacional posterior, al menos cuando se trata de una legislación de una entidad federativa. Es así que por ejemplo en relación con la ley de Virginia que previó la posibilidad de ejecutar personas con discapacidad mental fue declarada inconstitucional al motivo, entre otros, que “la comunidad mundial desaprobó la ejecución de condenados con retraso mental” [71] . Si embargo, por honestidad académica, es también necesario añadir que la decisión fue muy criticada, especialmente por los jueces disidentes. Antonio Scalia, uno de los ministros más influyentes de la Corte, notó que:

> *The views of other nations, however enlightened the Justices of this Court may think them to be, however, cannot be imposed upon*

[70] Breard and Treaty-Based Rights under the Consular Convention, *AJIL*, 1998.691.

[71] *Atkins vs Virginia*, 536 U.S. 304, 316 n. 21.

Americans through the Constitution"[72]*; "the Court's discussion of ... foreign views…is…meaningless dicta. Dangerous dicta, however, since this Court should not impose foreign moods, fads, or fashions on Americans*"[73].

54. Sin embargo, si uno realmente quiere seguir únicamente la lógica del *last-in-time*, se puede sostener que en realidad la "última" regla es el fallo de la Corte Internacional de Justicia. En efecto, los Estados Unidos aceptaron la jurisdicción de la Corte Internacional de Justicia y consecuentemente su decisión. Esta se integra en el derecho nacional y deroga, si se puede decir así, al *Antiterrorism and Effective Death Penalty Act*, adoptado en 1996. Desde el fallo *LaGrand*, el Congreso no tomó ninguna acción para invalidar los dispositivos de la decisión internacional; es entonces lógico considerar que la sentencia de la Corte Internacional de Justicia prevale sobre la ley anterior. La propia Suprema Corte de los Estados Unidos declaró que en ausencia de reacción legislativa del Congreso, se debe considerar que las decisiones judiciales reflejan el derecho positivo[74], al menos con respecto a la jurisprudencia americana. Sin embargo, *mutatis mutandis* se puede afirmar que tal posición se aplica también en relación a las decisiones de tribunales internacionales. Es interesante de notar que en similares casos, los Estados Unidos, como Estado víctima del hecho ilícito, se fueron hasta solicitar judicialmente la adopción de una ley interna del Estado demandado con el fin de estar seguro que el hecho ilícito no ocurrirá una vez más[75]. Por principio de reciprocidad, es lógico suponer que los Estados Unidos, y particularmente la Corte de Apelación Criminal de Oklahoma, están listos a aplicar el mismo principio a favor de los demás Estados. Como lo establece el

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[72] Idem.

[73] *Lawrence vs Texas*, 539 U.S.__, 123 S.Ct 2472 (2003), dissent., at 2495. A comparar con la opinión de Lord Diplock del Judicial Committee of the Privy Council: *Decisions of the Supreme Court of the U.S. on that country's Bill of Rights, whose phraseology is now nearly 200 years old, are of little help in construing provisions of... modern Commonwealth constitutions which follow broadly the Westminster model* (*Ong Ah Chuan vs Public Prosecutor*, [1981] App. Cas. 648 (PC1980).

[74] *Beale vs. United States*, 71 F.2d 737, cited by Chief Justice Stone (dissenting) in *Girouard vs United States*, 328 U.S. 61 (1946).

[75] En este sentido se puede citar el caso histórico del *Alabama* (1870) ; véase también: Bissonette, *La satisfaction comme mode de réparation en droit internacional*, Ginebra, 1952.

precedente *Standt*, "*reciprocity is the foundation of international law*"[76].

55. Más allá, el propio *Antiterrorism and Effective Death Penalty Act* enuncia textualmente que:

> *Congress enacted the Antiterrorism and Effective Death Penalty Act (AEDPA), which provides that a habeas petitioner alleging that he is held in violation of "treaties of the United States" will, **as a general rule**[77], not be afforded an evidentiary hearing if he "has failed to develop the factual basis of [the] claim in State court proceedings*[78].

56. Se dice "como regla general" y de ningún modo dice "siempre". En otras palabras, se trata de un principio, que no obstante admite también excepciones. Es de jurisprudencia constante en derecho comparado, que los tribunales tienen que interpretar la ley nacional a la luz de los tratados y hacer lo posible para obtener una conciliación de esas normas de fuentes distintas. El fallo precitado *Whitney v. Robertson*[79] lo establece en los Estados Unidos; el fallo *Sanchez* dice lo mismo en Francia[80]; y tal punto de vista también es compartido por ejemplo en Australia, no obstante que se trata de un país que adoptó la regla del dualismo[81].

57. ¿Cuál es entonces la *ratio legis* del *Antiterrorism and Effective Death Penalty Act*? Se puede pensar que se trata de una aplicación del concepto civilista del *Nemo auditur*. Es lógico no permitirle a un condenado invocar defensas para una petición de revisión del caso, si hubiera podido invocarlas en los procedimientos iniciales. Sin embargo, y eso es el punto, ¿cómo Osvaldo Torres y Luis Carlos Campos hubieran podido invocar sus derechos consulares?, si en

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[76] 153 F.Supp. 2d 427 (citando *United States vs Superville*, 40 F.Supp. 2d, 672, 676 (DVI 1999).

[77] Subrayado por nosotros.

[78] 28 U. S. C. A. §§ 2254(a), (e)(2) (Supp. 1998).

[79] 124 U.S. 190 (1888).

[80] Civ, 22/12/1931, *Sirey*, 1932.1.257.

[81] *Chung Kheng Lin vs Minister for Immigration* (1992) 176 CLR 1, 38, citado por Shaw, *International Law*, 4° ed., Cambridge University Press, 1997.121.

ningún momento supieron, y nadie les señaló a ellos, la existencia de ese derecho originado en la Convención de Viena. Esta postura no está compartida por el Presidente de los Estados Unidos en su *amicus curiae* en donde señala que cualquier abogado "razonable" hubiera tenido que conocer la existencia de los derechos otorgados por la Convención de Viena como lo demuestra el hecho que en otros casos antes de Breard se invoco ya estos mencionados derechos. Sin embargo, nos parece que en realidad se trata de un problema de la carga de la prueba. La regla del *procedural default* ¿no tendría que ser interpretada en el sentido de que la revisión no es permitida si el condenado tuvo conocimiento de sus derechos convencionales antes del último recurso admitido, pero no quiso ejercerlos?, y al Estado de demostrarlo. Esa afirmación puede ser lógica en la medida de que siempre fue admitida desde la decisión *Charming Betsy*[82] que existe la presunción según la cual el Congreso no legisla en contra de un tratado pre-existente y que consecuentemente nunca tiene que ser interpretado de manera que viole el derecho internacional si existe otras interpretaciones posibles que pueden concordar con lo previsto por el *jus gentium*[83].

58. Si es cierto, como lo menciona la Suprema Corte que el derecho internacional tiene que aplicarse de conformidad con el derecho procesal local, es aún posible considerar una interpretación armónica entre el derecho americano y el derecho internacional. En efecto, el hecho del abogado de no informar a su cliente de los derechos consulares, puede ser visto como una "asistencia ineficaz" violando la enmienda sexta a la Constitución americana, o, al menos en el sentido del precedente *Strickland*[84], un perjuicio probable, la duda debiendo ser a favor del sentenciado. En otras palabras, sería posible utilizar el control de convencionalidad para establecer una violación constitucional [85] . Tal camino tomo recientemente la Corte

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[82] Murray vs Schooner Charming Betsy, 6 U.S. (2 Cranch) 64 (1804); TWA vs Franklin Mint Corp, 466 U.S. 243, 252 (1984); United States vs PLO, 695 F.Supp. 1456 (1988).

[83] Hongju Koh, International Law is part of our Law, *AJIL*, 2004. 43.

[84] *Strickland v. Washington*, 466 U.S. 668 (1984).

[85] Graham, Playdoyer a favor del control convencional, *Revista de Derecho internacional y del MERCOSUR*, 2005.123.

constitucional alemana. Los más altos magistrados establecieron que la violación de la Convención de Viena constituye una violación de la "Regla de Derecho" que está consagrada por la Magna Carta alemana[86].

b) Repartición constitucional de las competencias

59. Como lo menciona la Suprema Corte de los Estados Unidos, la pena de muerte pronunciada al sujeto de un delito local impide las jurisdicciones federales de intervenir:

> *It is unfortunate that the motion for a stay comes before United States while proceedings are pending before the ICJ, however it is the Governor of Virginia's prerogative whether to stay the execution and nothing in the Court's existing case law allows United States to make that choice for him.*

60. Tal posición tiene su raíz en una cierta visión del federalismo americano. Como lo escriben Bradley y Goldsmith[87], la Constitución, según esa doctrina, tiene por objetivo de instaurar un gobierno central y varios subgobiernos. Si los padres fundadores acordaron que las relaciones exteriores fueran de la competencia del gobierno federal, no consideraron por lo tanto las relaciones internacionales como un valor absoluto.

61. Sin embargo, es olvidado que Hamilton, en relación con la práctica de los Estados confederados de hacer triunfar el derecho interno sobre los tratados, calificó tal situación como "imbécil y humillante"[88]. Y eso da pauta a Carlos Manuel Vázquez para afirmar

[86] Case 2 BVG 2115/01, *ASIL*, 2007.627, comentario Garditz.

[87] *Op.cit.*, p.675.

[88] *The Federalist*, #15, Clinton Rossiter, 1961.107.

al sujeto del rechazo del gobernador de Virginia de suspender la ejecución de Breard:

> *By hypothesis, the law of the land required compliance with the Order and thus preempted the conflicting state order setting the execution date. The Governor of Virginia and the lower-level state officials responsible for carrying out the execution were accordingly required by federal law not to execute Breard on the scheduled date. If those state officials threatened to violate that duty, then state and federal courts with jurisdiction over the subject matter had the authority and indeed the duty to give effect to that treaty-based obligation in preference to any conflicting state law*[89].

62. Como lo veremos más adelante[90], en realidad, sin prejuzgar si sobre el fondo la entidad federativa tiene o no *per se* que respetar las sentencias internacionales, no cabe duda que el poder ejecutivo tiene al menos la facultad de asegurar que las entidades federativas respeten las decisiones emanadas de jurisdicciones internacionales.

B – La jurisprudencia local

63. Los tribunales tienen por costumbre relegarse sobre la jurisprudencia federal para rechazar la aplicabilidad del derecho internacional (a) aunque este es sin duda superior a la legislación local (b). En otras palabras, para retomar la expresión de Kant, una brecha enorme separa el *sein* del *sollen*.

a) El "*sein*": *Procedural default* y *stare decisis*

64. La sentencia *Valdez* de la Corte de Apelación Criminal de Oklahoma[91] fue la primera sentencia en haber sido rendida después el fallo *LaGrand* de la Corte Internacional de Justicia. *In casu*, no fue impugnada la realidad de la violación de los derechos consulares; además, la Corte local, al contrario de los Estados Unidos en sus

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[89] *Breard* and the Federal Power to Require Compliance with ICJ Orders of provisional Measures, *AJIL*, 1998. 683.

[90] *Infra* #112 sq.

[91] Que funge como Corte suprema local en material penal.

procedimientos internacionales y de la propia Suprema Corte de los Estados Unidos en el asunto *Breard*, reconoció que la información de los derechos consulares hubiera podido cambiar el resultado final del procedimiento penal. Sin embargo, los jueces locales rechazaron seguir la decisión internacional *LaGrand*[92]. Obviamente, la Corte de Apelación Criminal de Oklahoma se basó sobre el fallo *Breard* de la Suprema Corte para invocar el *procedural default,* observando que Valdez hubiera podido invocar la violación mucho tiempo antes del fallo *LaGrand* en la medida que no fue la primera vez que tal argumento fue invocado ante un tribunal de Oklahoma[93]. Pero más allá, fundándose sobre la legislación local [94], los abogados argumentaron que la decisión *LaGrand* constituye una "nueva regla constitucional" que tiene que ser tomada en cuenta. Sin embargo, el argumento no pasó sobre, una vez más, el *procedural default* del fallo *Breard* de la Suprema Corte:

> LaGrand *is not a "new rule of constitutional law that was given retroactive effect by the United States Supreme Court or a court of appellate jurisdiction of this state." 22 O.S. 2001, § 1089(D)(9). Only that portion of* LaGrand *which pronounced the Convention confers "individual rights" and which addressed our doctrine of procedural default is arguably new "law." Whether the Convention creates individual rights has been raised in numerous courts across the country for years, and could reasonably have been formulated prior to the ICJ decision in* LaGrand. *Whether the treaty creates individually enforceable rights or not, the United States Supreme Court in* Breard *specifically rejected the contention that the doctrine of procedural default was not applicable to provisions of the Vienna Convention and until such time as the supreme arbiter of the law of the United States changes its ruling, its decision in* Breard *controls this issue. Petitioner cannot be afforded review under our statutes on the ground that the ICJ's interpretation of the Convention in* LaGrand *constitutes a new rule of constitutional law*;

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[92] En el caso, la revisión del procedimiento de Valdez fue ordenada sobre la base de disposiciones de derecho interno.

[93] *See Flores vs Stat*e, 1999 OK CR 52, 994 P.2d 782; *Martinez vs Stat*e, 1999 OK CR 33, 984 P.2d 813; *Al-Mosawi vs Stat*e, 1998 OK CR 18, 956 P.2d 906.

[94] 22 O.S. 2001, #1089 (D) (9): *A legal basis of a claim is unavailable if: (1) it was not recognized by or could not have been reasonably formulated from a final decision of the United States Supreme Court, a court of appeals of the United States, or a court of appellate jurisdiction of this state on or before that date; or (2) it is a new rule of constitutional law that was given retroactive effect by the United States Supreme Court or a court of appellate jurisdiction of this state and had not been announced on or before that date. A factual basis of a claim is unavailable if the factual basis was not ascertainable through the exercise of reasonable diligence on or before that date*.

65. precisando que, al contrario de los fallos de tribunales internacionales, las decisiones de la Suprema Corte de los Estados Unidos son precedentes que se imponen a las cortes locales. Sin embargo, la propia Suprema Corte de los Estados Unidos ha establecido que las decisiones que rechazan la admisibilidad de una petición no pueden ser utilizadas como precedentes. Según la regla pronunciada en *Teague vs Lane*[95], los *dicta* en casos en donde se rechazó el *certiorari* no pueden ser invocados en otros casos. Los rechazos de *certiorari* no prejuzguen sobre los méritos de los asuntos sometidos y, como ya lo estableció la Suprema Corte de los Estados Unidos en el fallo *Maryland v. Baltimore Radio Show*[96], no pueden ser considerados como "precedentes". Y tal punto de vista fue confirmado hace poco tiempo en *Madej vs Gilmore*[97] en donde el Juez de Distrito del Norte de Illinois Coar puso de manera muy seria en duda el carácter de precedente del fallo *Breard* de la Suprema Corte subrayando el carácter *per curiam* de la decisión y el hecho de que no había una argumentación sobre el mérito, concluyendo "Breard *is entitled to less "precedential authority*", para no decir que en realidad *Breard* no tiene ninguna autoridad como *stare decisis*.

66. Además, la decisión de la Corte de Oklahoma de rechazar la petición de Valdez sobre la regla del *procedural default*, no puede aplicarse, porque justamente este punto fue condenado por la Corte Internacional de Justicia. No hay duda que tribunales inferiores pueden apartarse de decisiones de cortes superiores, si la justicia requiere tal acción. Como uno de los jueces disidentes en el fallo *Girouard* lo expresó,

> *Although I recognize my duty as an inferior federal judge to accept and follow controlling decisions of the Supreme Court of the United States,*

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[95] 489 U.S. 288 (1989).

[96] 338 U.S. 912, 917 (1950).

[97] No. 98-C-1866, 2002 WL 370222, at *1 (N.D. Ill. Mar. 8, 2002).

> *[...] I also relieve that as a consequence of this we on this court are not under a positive duty always to follow blindly*[98]*,*

porque, retomando las palabras del Juez Parker, "*decisions are but evidences of the law and not the law itself"*[99]. El Decano de Harvard Albert Sacks opinó[100] que para que un juez no respete el *stare decisis* tiene que preguntarse si la decisión anterior fue ¿incorrecta?, ¿injusta?, ¿vale la pena de respetar el *status quo*? ¿Cuáles son los intereses en vista de la política nacional? ¿Cuáles son las consecuencias para continuar con la equivocación del precedente? Creemos que las respuestas a todas estas interrogantes, siempre serán en favor de la revisión de los casos concernidos. Y si realmente hay que referirse a la regla del *stare decisis*, entonces el precedente no es *Breard*, sino la decisión *LaGrand* que se impone como precedente a los tribunales estadounidenses[101] asegurando el respeto de las obligaciones originadas en la Convención de Viena, eso además que el tratado internacional es superior al orden jurídico local. Como lo mencionó el Juez Chapel,

> Avena *directs the Unites States to review and reconsider Torres's conviction and sentence in light of the consequences of the treaty violation. That review and reconsideration falls to this Court. This is the first state pleading in which Torres has raised his Vienna Convention claim, and normally the Court would consider it procedurally barred. However, while leaving the particular method of review and reconsideration up to the United States, Avena states that a complete application of procedural bar will not fulfill the mandate to review and reconsider the conviction, if procedural bar prevents the Vienna Convention claim from being heard. In order to give full effect to Avena, we are bound by its holding to review Torres's conviction*

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[98] *United States vs Girouard*, 149 F.2d 760 (1st Cir 1945).

[99] Barnette vs West Virginia State Board of Education, D.C., 47 F. Supp. 251, 253.

[100] Hart & Sacks, *The Legal Process*, Foundation Press, 1994.1357.

[101] Tal como lo sostiene Cara Drinan en su artículo, Article 36 of the Vienna Convention on Consular Relations: Private Enforcement in American Courts after LaGrand, *Stanford Law Review*, 2002.1303, 1312. Es también interesante de notar que en el caso *Mara'abe vs The Prime Minister of Israel*, 15/9/05, la Corte suprema de Israel declaró que le pertenece de dar "*the appropriate weight to the norms of International law as developed and interpreted by the ICJ in its Advisory Opinion*" (*Int'l Law in Brief*, 25/9/05).

and sentence in light of the Vienna Convention violation, without recourse to procedural bar. ... Torres's Vienna Convention claim was generated by the State of Oklahoma's initial failure to comply with a treaty. I believe we cannot fulfill the goal of a fair and just review of Torres's case if we refuse to look at his Vienna Convention claims on the merits.

b) El "*sollen*": La superioridad del tratado sobre la legislación local

67. Como la sentencia de la Corte Internacional es sobre la interpretación de la Convención de Viena, debe ser considerada como parte integral del instrumento[102]…que a su vez es parte del derecho americano y superior a la legislación municipal[103]. En *Reid*, se estableció:

> *The inclusion of "treaties" in the Clause was a deliberate effort by the Framers to subordinate contrary State laws to treaties entered into by the national government. Under the Articles of Confederation, States had frequently enacted laws which, for example, clashed with the Treaty of Paris of 1783. Just as the Framers intended duly enacted laws at the national level to supersede contrary State laws, so too, national treaties were intended to trump State law under the Supremacy Clause[104].*

68. La fórmula también se encuentra en el *Restatement (Third) on the Foreign Relations of the United States:*

> *§ 111 (1) International Law and international agreements of the United Status are law of the United States and supreme over the law of the several States.*

69. Es por eso que el Profesor Vázquez afirmó al sujeto de la decisión *Breard*:

> *By hypothesis, the law of the land required compliance with the [ICJ"s LaGrand] Order and thus preempted the conflicting state*

[102] *Contra*: Combacau & Sur, *Droit international public*, 2° ed, Paris, Montchrestien, 1995.176 ; sin embargo, los autores acuerdan sobre el valor "moral" de las decisiones que pueden influir sobre cómo se interpretará un tratado en el futuro.

[103] Cassel, Consular Rights in Criminal Cases: The ICJ strikes a Careful Balance, 33 *International Law News,* #3, 20.

[104] *Reid vs Covert*, 354 U.S. 1, 16-17 (1957); cf también *Antoine vs Washington*, 420 U.S. 194, 201 (1975).

order setting the execution date. The Governor of Virginia and the lower-level state officials responsible for carrying out the execution were accordingly required by federal law not to execute Breard on the scheduled date. If those state officials threatened to violate that duty, then state and federal courts with jurisdiction over the subject matter had the authority and indeed the duty to give effect to that treaty-based obligation in preference to any conflicting state law.

70. En la sentencia en fecha del 13 de mayo de 2004 en relación con la petición de Osvaldo Torres para obtener la revisión de su procedimiento, el Juez Chapel, en una opinión concurrente[105], afirmó la superioridad del derecho convencional sobre la ley local, y añadió:

However, in these unusual circumstances the issue of whether this Court must abide by the court's opinion in Torres's case is not ours to determine. The United States Senate and the President have made that decision for United States. The Optional Protocol, an integral part of the treaty, provides that the International Court of Justice is the forum for resolution of disputes under the Vienna Convention. The negotiation and administration of treaties is reserved to the Executive Branch, with Senate ratification. Therefore, when interpreting a treaty, we give great weight to the opinion and practice of the government department primarily responsible for it. The State Department has consistently taken the position that the only remedies under the Vienna Convention are diplomatic, political, or exist between states under international law. ...the State Department has also consistently turned to the International Court of Justice to provide a binding resolution of disputes under the Vienna Convention, and has relied on the binding nature of International Court of Justice decisions to enforce United States rights under the Convention[106]*. The Avena decision mandates a remedy for a particular violation of Torres's, and México's rights under the Vienna Convention.*

[At] its simplest, this is a matter of contract. A treaty is a contract between sovereigns. The notion that contracts must be enforceable against those who enter into them is fundamental to the Rule of Law. This case is resolved by that very basic idea. The United States voluntarily and legally entered into a treaty, a contract with over 100 other countries. The United States is bound by the terms of the treaty and the State of Oklahoma is obligated by virtue of the Supremacy

[105] Corte de Apelación Criminal de Oklahoma, 13/5/2004, No. PCD-04-442.

[106] La misma posición fue adoptada por los Ministros Breyer y Stevens en su opinión disidente en la decisión *per curiam* del 23 de mayo de 2005 de la Suprema Corte en el caso *Medellin*.

> *Clause to give effect to the treaty. As this Court is bound by the treaty itself, we are bound to give full faith and credit to the Avena decision.*

71. La misma *ratio legis* fue utilizada por el Juez Coar en su decisión en el asunto *Madej*[107], considerando que el fallo internacional se impone a los Estados Unidos como ley federal y no permite invocar el *procedural default*. En *Jogi*, el séptimo Circuito, considero que el fallo de la Corte Internacional de Justicia se impone sobre el derecho nacional como una interpretación autentica del tratado[108].

72. En otras palabras, el tratado internacional es ni más ni menos que la *Grundnorm* de la pirámide kelseniana[109] del orden jurídico local. Si es cierto que el *treaty-making* pertenece de manera exclusiva al poder federal, es también verdad que los tratados ratificados automáticamente se integran en la legislación local, porque las entidades federativas han aceptado tal situación por su consentimiento al pacto federal, obligándose así a respetar las obligaciones internacionales, como las de la Convención de Viena, auto-limitando su soberanía local.

c) El compromiso: La *Comity*

73. Para aquellos que estén de acuerdo en aplicar las sentencias de la Corte internacional sin que por lo tanto consideren que estos tipos de fallos constituyen decisiones "obligatorias" para las jurisdicciones nacionales, leerán con gran interés la propuesta de la ex Presidenta de la *American Society of International Law* Anne-Marie Slaughter, quien defiende la idea que se debe dar efecto a la sentencia internacional en virtud de la noción de "*Judicial Comity*" definido *" as the decision by a court in one country to decline jurisdiction "over matters more appropriately adjudged elsewhere"*[110], posición que finalmente fue consagrada por la Presidencia Americana en su *amicus curiae*[111]. En efecto, según el Presidente Bush, la decisión de

[107] *Supra* nota 97.

[108] *Jogi v. Voges*, No 01-1657 (7th Cir. 2005).

[109] Les rapports de système entre le droit international et le droit interne, *RCADI*, 1926-IV, p. 231.

[110] Breard and judicial Comity, *AJIL,* 1998. 708.

[111] *Op. cit*., p. 9.

la Corte internacional tiene solo efectos jurídicos internacionales para los Estados Unidos como Estado soberano. Consecuentemente, pertenece al Presidente de determinar como cumplir con esta obligación internacional; y la mejor manera es de requerir a los tribunales nacionales de cumplir con la decisión de la Corte de La Haya según los principios de la *Comitas*[112]. Sin embargo, el portavoz del Procurador general de Texas declaró tener dudas sobre el hecho que el Presidente tenga constitucionalmente facultades para obligar los tribunales estatales de respectar una decisión de una Corte internacional que es contraria a las leyes locales[113]. Sin embargo, como lo escribe el Profesor Kirgis, es una competencia exclusiva del Presidente de tomar decisiones en materia de relaciones exteriores y la decisión de cumplir con el fallo de la Corte mundial es, según el autor, una decisión de relaciones exteriores, que es *ipso jure* superior a las leyes locales según una jurisprudencia constante de la Suprema Corte de los Estados Unidos[114].

74. Siguiendo el reenvío del caso de Medellin de la Suprema Corte a la Corte de Apelaciones Criminales de Texas, esta tuvo la oportunidad de retomar el caso y decidir en un voto de 8 sobre 9 que no se puede ordenar la revisión del proceso de Medellin, porque la decisión de la CIJ y el memorandum del Presidente de los Estados Unidos no constituyen leyes federales[115]. Retomando la decisión de Sanchez-Llamas de la Suprema Corte[116], no cabe duda para los magistrados tejanos que el artículo 36 de la Convención de Viena a lo máximo merece una "consideración respetuosa" (sic). En abril de 2007, la Suprema Corte otorgó el certiorari para reexaminar el caso.

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[112] *Comity (or "*Comitas*" following the ancient terminology) is based on the fact that no foreign judgment has any effect of its own force beyond the limits of the sovereignty from which its authority is derived. To extent to which the United States honors the decisions of foreign nations is a matter of choice, governed by the comity of nations. Following* Hilton vs Guyot*, Comity is "neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other". However, the purpose of Comity is "to give effect, whenever possible, to the executive, legislative and judicial acts of a foreign sovereign so as to strengthen international cooperation* (Graham, *Lectures of the Legal System of the United States*, 2 ed., 2004.530).

[113] Liptak, US says it has withdrawn from World judicial body, *NY Times*, 10/3/05, p. A14.

[114] President Bush's Determination that State Courts Must Give Effect to the ICJ's Decision in Avena, *ASIL Newsletter*, vol. 21, #2, marzo 2005.1, 11.

[115] *Ex parte Medellin*, ___ S.W.3d ____, 2006 WL 3302639 (Tex. Crim. App. 2006).

[116] *Sanchez-Llamas v. Oregon*, ___ U.S. ____, 126 S.Ct. 2669 (2006).

Título II
El cumplimiento de las obligaciones de la Convención de Viena

75. Si tradicionalmente los tratados crearon derechos y obligaciones, el único beneficiario fue el Estado. Sin embargo, desde el fallo *Dantzig*[117] y la codificación de los derechos humanos, más y más instrumentos internacionales también crean derechos en el patrimonio de los individuos. Es por esto que la violación de la Convención de Viena establece en primer lugar un perjuicio directo para el Estado por el no respeto de su derecho propio que consiste en que el otro Estado no cumplió con lo pactado (Sección 1). Sin embargo, también hay un perjuicio indirecto para el mismo Estado en relación con el no respeto del derecho individual de la persona privada reconocido por el mismo artículo 36 (Sección 2).

[117] *Infra* #122.

Sección 1: El derecho propio del Estado nacional

76. Una vez verificado que el derecho propio del Estado nacional ha sido consagrado (A), es necesario investigar como este derecho puede ser ejecutado coactivamente en el orden jurídico del Estado de recepción (B).

A – La consagración del derecho propio

77. Antes de ver como se define el derecho propio del Estado nacional (b), es importante en primer lugar explicar la relación entre este derecho propio y la protección diplomática (a).

a) El mecanismo de la protección diplomática

78. La protección diplomática es una figura jurídica del derecho internacional que consiste en que el Estado nacional considere que la violación de los derechos de su nacional en el Estado de recepción constituye una violación a su derecho propio de ver respetadas las garantías que ofrece el derecho internacional a sus naturales.

79. Si el Estado nacional acepta el requerimiento de su nacional de otorgarle la mencionada protección, no va por lo tanto a subrogarse a la persona para cumplir la incapacidad de la persona a iniciar una acción internacional. Al contrario, el Estado va a iniciar una acción propia para obtener la reparación de su perjuicio - que es el no-respeto de su derecho de ver a sus nacionales tratados según las normas internacionales en vigor[118]. En otras palabras, no se trata del perjuicio material de la persona, sino del perjuicio moral del Estado nacional. De éste, hay dos consecuencias. Primero, el ejercicio de la protección esta considerada como discrecionaria[119]; el Estado puede rechazar ejercerla si en caso las necesitadas de su política extranjera

[118] CPJI, *Mavrommatis*, 30/8/24, serie A, n° 2; *Emprunts serbes*, 12/7/29, serie A, n° 20-21; *Chemins de fer Panevezys-Saldutiskis*, serie A/B, n° 76; CIJ, *Nottebohm*, 6/4/1955, *Rec.*, 24; *Alvarez-Machain,* 284 F.3d 1039 (9th Cir 2002). En derecho francés, se considera la decisión de otorgar o negar la protección diplomática como un " *acte de gouvernement*" no susceptible de recursos ante los tribunales (TC, *Préfet de Paris*, 2/12/91, *Leb.*, 478).

[119] CIJ, *Barcelona Traction*, 5/2/1970, *Rec.*, 43.

son incompatibles con el endoso de la reclamación. A nuestro conocimiento, no hay una regla que subordine la admisibilidad de una acción en protección a la condición que el nacional la pidió[120]. La segunda consecuencia de la internacionalización del perjuicio de la persona es que el Estado, en caso del ejercicio de la protección, puede solicitar la reparación que desee aunque por ejemplo una reparación moral esté en total inadecuación con el perjuicio sufrido por el nacional. En el sentido contrario, en caso de obtención de una reparación pecuniaria, correspondiendo al perjuicio del nacional, el Estado no tiene la obligación de imputar la suma obtenida a la persona lesionada. Aunque no se puede aquí ir más en detalle en el marco del presente estudio, no obstante es importante mencionar que lo expuesto no implica que asumamos tal posición. En efecto, no cabe duda que para nosotros en realidad hay subrogación y que la protección diplomática no es una facultad discrecionaria del Estado como lo imaginó Vattel[121], sino una obligación[122], tal como lo consagró, a justo título, la Constitución alemana de Weimar[123]. La Comisión de Derecho Internacional de las Naciones Unidas ya tomó un primer paso en esta dirección en sus trabajos sobre la protección diplomática. El *Rapporteur spécial* Profesor Dugart propuso en su primer informe el artículo 4(1) que prevé que el otorgamiento de la protección diplomática es una obligación para el Estado cuando el nacional fue victima de una violación de una norma de *jus cogens*[124]

[120] En el mismo sentido: Seidl-Hohenveldern & Stein, *Völkerrecht*, 10° ed., Colonia, Heymanns, 2000, § 1602.

[121] Le droit des gens ou principes de la loi naturelle appliquée à la conduite et aux affaires des nations et des souverains, 1758.

[122] Es interesante mencionar una sentencia reciente de la Corte constitucional de África de Sur en donde los litigantes pretendieron que la protección diplomática es un derecho humano. Sin embargo, la Corte enunció: "*Currently the prevailing view is that diplomatic protection is not recognised by international law as a human right and cannot be enforced as such. To do so may give rise to more problems than it would solve. Diplomatic protection remains the prerogative of the state to be exercised at its discretion. It must be accepted, therefore, that the applicants cannot base their claims on customary international law"* (*Kaunda & Others vs. The President of the RSA and Others* (Case CCT 23/04) (August 4, 2004).

[123] Sin embargo, con la adopción de la Constitución post-segunda guerra mundial, el *Bundesverfassungsgericht* se pronuncio a favor de una muy amplia discrecionalidad por parte del gobierno en las decisiones en relación con la protección diplomática (16/12/80, 55 *BVerfGE* 349).

[124] En una primera aceptación el *jus cogens* es una norma convencional consagrada por la Convención de Viena sobre el Derecho de los Tratados. Consecuentemente, como cualquier estipulación contractual, ella tendría que tener solamente efectos *inter partes*. Sin embargo, los últimos años, bajo un movimiento académico, parece que el *jus cogens* se transforma más y más en un orden público internacional. En el asunto *Barcelona Traction* (5/2/70), la CIJ distingue entre las obligaciones entre los Estados y las

por parte del otro Estado[125]. De la misma manera, aunque reconociendo la protección diplomática como una prerrogativa de la corona, los tribunales ingleses, sin embargo enunciaron como obligación para el Estado de al menos admitir la solicitud de protección y analizarla, aunque sea para rechazarla[126]. Con respecto al derecho mexicano, es posible considerar que la integración del derecho consuetudinario en el derecho interno puede abrir la puerta a una obligación del Estado mexicano de otorgar la protección si las condiciones lo exigen[127].

80. Sin embargo, hay un principio general en la materia que establece que se necesita el agotamiento de los recursos internos antes de ejercer la protección diplomática. Los Estados Unidos lo subrayaron en sus argumentos del caso *LaGrand*: si, había violación del derecho consular, sin embargo pertenece a los condenados el señalarlo en sus procedimientos. Habiendo fallado, el condenado no puede argumentar que agotó los recursos internos; al contrario, en la medida que el abogado y el cliente son considerados en los procedimientos como una sola persona, no es posible argumentar que había un

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obligaciones de los Estados hacia la Comunidad internacional; las últimas siendo obligaciones *erga omnes* abriendo la puerta a la *actio popularis*. Son normas *erga omnes*, según las indicaciones no limitativas de la CIJ: la prohibición de los actos de agresión, genocidio, violación de los derechos humanos fundamentales como por ejemplo el esclavismo o la discriminación racial. En el aviso *Licéité des armes nucléaires* (8/7/1996), la Corte calificó varias normas del derecho humanitario como normas *erga omnes*, mientras que el presidente Bedjaoui designó en su declaración esas reglas como *jus cogens*. El concepto del *jus cogens* implica naturalmente una jerarquía de las normas. Según la CEDH, así hay una superioridad de las normas internacionales sobre las normas regionales en materia de protección de los derechos humanos (*Sreletz vs Allemagne*, 22/3/2001, *RGDIP*, 2001.774). Según la misma Corte, el derecho a la vida es una regla de *jus cogens.* La Comisión arbitral para la ex Yugoslavia mencionó dos veces la obligación de no derogar al *jus cogens* sin por lo tanto definirlo (aviso 1, 29/1//91; aviso 9, 4/7/92; aviso 10, 4/7/92. En Alemania, la Corte constitucional en el caso *Streletz* parece tomar el *jus cogens* como una noción de derecho natural, conteniendo normas basados sobre el valor y la dignidad del ser humano y compartidas para todos los pueblos (sentencia citada por la CEDH en el mismo asunto). En Grecia, la Corte suprema habló de normas fundamentales para las Convenciones de La Haya sobre el derecho de la guerra (*Prefecture of Voiotia vs. Germany*, #11/2000, 4/5/2000, *AJIL*, 2001.198, nota Gavouneli & Bantekas).

[125] Véase también: Warbrick, Diplomatic Representations and Diplomatic Protection, *Ch.*, 2002.723, 733.

[126] Supreme Court of Judicature, Court of Appeal (Civil Division), *Abbasi and another vs Secretary of State for Foreign and Commonwealth Affairs & Secretary of State for the Home Department*, 6/11/2002, #104. También en este sentido: Corte constitucional de África de Sur, *Kaunda & others*, *loc. cit*.

[127] Permitiendo así al particular de ampararse en contra una decisión negativa.

agotamiento de los recursos, sino una renuncia de la parte del condenado de presentar el argumento al buen lugar y en tiempo. Sin embargo, como lo observó Alemania en sus escritos ¿cómo alguien puede renunciar a un derecho si nunca supo que tiene este derecho? La Corte realmente no respondió a los argumentos de cada parte, sino que consideró que la controversia opone a los Estados Unidos y Alemania en sus derechos propios y que consecuentemente la regla del agotamiento de los recursos internos no se aplica a los Estados.

81. Sin embargo, es difícil entender la posición de la Corte internacional. En efecto, como lo vamos a ver más adelante[128], la Corte reconoce que el individuo tiene en la aplicación del derecho internacional un derecho subjetivo; sin embargo, si tal punto de vista debe prevalecer, entonces los recursos internos tienen que ser agotados por la persona y los Estados Unidos estarían en lo correcto en sus afirmaciones. Sin embargo, los jueces internacionales actuaron como si los derechos del Estado y no de la persona hubieran sido violados. En otras palabras, la Corte da la impresión que en razón de la incapacidad del individuo de presentarse ante una jurisdicción internacional, el Estado se subroga a éste y ejerce la acción en su nombre propio. En realidad, se puede decir que con respecto al fondo, estamos en presencia de derechos para el particular, y derechos propios para el Estado.

b) El derecho propio de México

82. Los Estados que promovieron las acciones ante la Corte de La Haya tuvieron perjuicios propios. En efecto, la ausencia de notificación de los derechos consulares a la persona arrestada tiene por efecto por una parte la violación del derecho propio del Estado de ver que el derecho individual de su nacional de poder informar al consulado; por otra parte, la violación de este derecho tiene automáticamente como consecuencia la violación del derecho del Estado de contactar su nacional y brindarle la asistencia consular. Consecuentemente, el Estado nacional tiene derecho propio a la reparación. En el caso *LaGrand*, Alemania solamente obtuvo como derecho propio la reparación moral del perjuicio, visto que sus nacionales ya fueron

[128] *Infra* # 120.

ejecutados. Otra fue la hipótesis en la cual México intervino. En efecto, cuando la Corte internacional emitió su fallo con respecto a los nacionales mexicanos, estos últimos estaban aún con vida. México obtuvo consecuentemente no sólo una simple reparación moral, sino también la restitución integral de la situación jurídica antes que la violación del derecho consular perjudicara a México. En efecto, la Corte internacional ordenó a los Estados Unidos "la revisión y reconsideración de la(s) sentencia(s) de, entre otros, Osvaldo Torres[129]. Sin embargo es necesario añadir inmediatamente que la obligación pre-mencionada podrá ser cumplida, como lo hemos mencionado antes[130], de acuerdo con los medios que los Estados Unidos pueden elegir libremente. No obstante, permanece la hipótesis de que los Estados Unidos no cumplen con el dispositivo de la sentencia, forzando a México a buscar una ejecución forzosa ante los tribunales americanos.

[129] "(9) By fourteen votes to one,

Finds that the appropriate reparation in this case consists in the obligation of the United States of America to provide, by means of its own choosing, review and reconsideration of the convictions and sentences of the Mexican nationals referred to in subparagraphs (4), (5), (6) and (7) above, by taking account both of the violation of the rights set forth in Article 36 of the Convention and of paragraphs 138 to 141 of this Judgment; IN FAVOUR: President Shi; Vice-President Ranjeva; Judges Guillaume, Koroma, Vereshchetin, Higgins, Kooijmans, Rezek, Al-Khasawneh, Buergenthal, Elaraby, Owada, Tomka; Judge ad hoc Sepúlveda. AGAINST: Judge Parra-Aranguren".

Véase el dispositivo del caso *LaGrand*:

"Finds that should nationals of the Federal Republic of Germany nonetheless be sentenced to severe penalties, without their rights under Article 36, paragraph 1 (b), of the Convention having been respected, the United States of America, by means of its own choosing, shall allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in that Convention. IN FAVOUR: President Guillaume; Vice-President Shi; Judges Bedjaoui, Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal; AGAINST: Judge Oda".

A subrayar que en los dos casos el Juez americano Thomas Buergenthal votó a favor de los fallos contra los Estados Unidos de América.

[130] *Supra* #57.

B – La ejecución del derecho propio

83. Es importante de tener en mente que la Corte de La Haya no tiene la facultad de asegurar por si misma el cumplimiento de sus decisiones, posición reafirmada desde el asunto *Nuclear Tests*[131]. Sin embargo, en virtud del artículo 93 de la Carta de las Naciones Unidas, los Estados miembros tienen la obligación de cumplir con lo decidido por la Corte[132], y la misma Carta prevé como única opción un procedimiento internacional para la ejecución coactiva de la sentencia, consistente en solicitar al Consejo de Seguridad de recomendar u ordenar el cumplimiento del fallo de la Corte. En caso de rechazo por el Estado condenado, el Consejo de Seguridad puede ordenar medidas coercitivas. Sin embargo, tal procedimiento es "políticamente" imposible[133].

84. Eso obliga al Estado beneficiario de la sentencia internacional a buscar su cumplimiento ante los tribunales locales. Sin embargo, es cierto que hasta hoy en día ninguna acción logró el resultado por una supuesta incompetencia de los tribunales americanos. Los argumentos utilizados por las jurisdicciones americanas pueden fácilmente ser refutados (a), porque en realidad hay criterios de competencia para acoger una acción de un Estado en contra los Estados Unidos (b).

a) Refutación de los criterios de incompetencia

85. El argumento que sostiene que la ejecución de una sentencia por parte de los Estados Unidos es una cuestión política impidiendo a los tribunales de conocer del caso (1) no tiene más sentido que la posición que invoca la inmunidad de los Estados (2).

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[131] Meritos, 20/12/1974, *Rec.* 1974.

[132] Para un panorama general en materia de cumplimiento de los fallos de la CIJ: Paulson, Compliance with Final Judgments of the International Court of Justice since 1987, *AJIL*, 2004. 434.

[133] Sería diplomáticamente impensable que México solicita al Consejo de Seguridad ordenar en virtud del Capítulo VII de la Carta el mando de tropas internacionales en los Estados Unidos para implementar la decisión de la Corte internacional….sin mencionar que los Estados Unidos, como miembro permanente del Consejo de Seguridad, ¡tienen un derecho de veto absoluto!

1. Refutación de la cuestión política

86. Siguiendo el Segundo Circuito, no le es posible a los tribunales pronunciarse sobre asuntos en donde la decisión judicial presenta un riesgo serio de contradicción con “importantes intereses gubernamentales”, eso especialmente en materia de política exterior. Sin embargo, la inversa no es siempre verdad, es decir que cualquier litigio que concierne las relaciones exteriores no es necesariamente una cuestión política impidiendo a los tribunales de resolver la controversia[134]. En efecto, como lo explica el Profesor Vázquez de la Universidad de Georgetown en relación con la decisión *Breard*:

> *I do not doubt that, under our constitutional system, it is often for the federal political branches to decide when foreign policy interests warrant action (or inaction) by the states, and that in making this determination it is appropriate for those branches to take into account "federalism concerns." The Senate presumably took federalism interests into account when it consented to the Vienna Convention on Consular Relations, as did the President when he ratified it. But these actions transformed what had been mere foreign policy interests into legal obligations of the United States, including Virginia. Paraguay argued that, because of Virginia's conceded violation of this treaty, the treaty (implicitly) required that Breard's death sentence be vacated. The executive branch argued that it did not require this, and that was the issue before the ICJ. Another treaty of the United States gives the ICJ jurisdiction to indicate provisional measures in cases before it, and requires parties to comply with ICJ judgments. If those orders were binding, then they too were legal obligations, not mere foreign policy interests to be balanced open-endedly against other subconstitutional "federalism concerns.*
>
> *Since the U.S. Government agreed with Paraguay that Virginian officials had violated the treaty, this case did not raise the difficult policy questions that might have arisen if the U.S. executive branch had contested the allegation of breach. In that event, it would have been up to the federal court, after giving "due weight" to the Executive's position, see Kolovrat v. Oregon, 366 U.S. 187 (1961); Perkins vs Elg, 307 U.S. 325 (1939), to construe the treaty authoritatively*[136].

87. Al contrario, si hay una “excepción de política exterior”, entonces es en favor de la aplicación del fallo internacional en el derecho interno.

[134] Japan Whaling Ass'n vs. American Cetacean Society, 478 U.S. 221, 229-30 (1986).

[136] Breard and the Federal Power to Require Compliance with ICJ Orders of Provisional Measures, *AJIL*, 1998.683, nota 40.

Como lo subrayaron los *amici curiae*[137] en el caso *Breard*, es porque es justamente el interés de los Estados Unidos a nivel internacional, que tienen que respetar el fallo de la Corte Internacional de Justicia, y aplicarlo dentro los órdenes jurídicos de las entidades federales[138].

2. Refutación de la inmunidad de las entidades federativas

88. El argumento principal de la Suprema Corte de los Estados Unidos en la decisión *Breard* como en la acción de Alemania contra los Estados Unidos consistió en la invocación de la Enmienda XI que dispone:

> *The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one on the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.*

89. Sin embargo, la misma Constitución prevé en su Sección 2 que:

> *The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;[...] between a State [ ] and foreign States, Citizens or Subjects. In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the Supreme Court shall have original Jurisdiction.*

90. Por pura retórica uno se puede preguntar ¿cómo es posible que la Suprema Corte en *Breard* desarrolló el argumento de la inmunidad como último punto?; ¿no hubiera sido más lógico desechar la petición de Paraguay únicamente y exclusivamente con este argumento, ¿si la regla de la inmunidad es tan obvia? Y qué pensar del *amicus curiae* del propio gobierno de los Estados Unidos en el caso *Paraguay vs Allen*[139], en donde se le suplicó al tribunal no analizar el asunto bajo el ángulo de la undécima enmienda visto la complejidad de la cuestión en relación con las relaciones internacionales.

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[137] Profs. Bermann, Caron, Chayes, Damrosch, Gardner, Henkin, Koh, Lowenfeld, Reisman, Schachter Slaughter, Weiss.

[138] Brief for Amicus curiae for the Human Rights Committee of the American Branch of the International Law Association, Breard vs Greene 118 S.Ct. 1352 (1998).

[139] 134 F.3d 622 (4th Cir. 1998).

91. Para resolver la contradicción entre la Enmienda XI y la Sección constitucional 2, es posible argumentar que la regla de la inmunidad se aplica caso por caso y no como una regla absoluta. Si es verdad que se enunció en *Kimel* v. *Florida Bd. of Regents*[140], que la Enmienda XI tiene justamente por objetivo proteger los Estados contra demandas promovidas por individuos en cortes federales, se debe también destacar que en *Breard*, la Suprema Corte insistió sobre una interpretación estricta de la palabra "*ciudadano*" utilizado por el *United States Code* para establecer la jurisdicción federal[141]; y observó que un Estado no puede ser un "ciudadano" y que consecuentemente Paraguay no puede hacer alusión a dicho precepto. Sin embargo, tal interpretación literal tiene entonces también que aplicarse al sujeto de las inmunidades. En efecto, si la Enmienda XI prevé la inmunidad de las entidades federativas en contra acciones de "ciudadanos", será lógico que la misma interpretación tiene que dar lugar; la inmunidad existe en contra "ciudadanos" y no en contra otros Estados.

92. Además, el criterio para aceptar el juego de la inmunidad fue codificado por el *Foreign Sovereign Immunities Act*[142] que distingue entre los actos *de jure imperii* y *de jure gestionis*[143]. Si el Estado actúa como soberano es inmune; si actúa en transacciones comerciales no es inmune[144]. Sin embargo, es posible sostener que *in casu* estamos en

[140] 528 U. S. 62, 72-73 (2000).

[141] 42 USC 1983: " *Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia*".

[142] 28 U.S.C. l330.

[143] Graham, *op.cit.*, p. 425.

[144] "*When a foreign government acts, not as regulator of a market, but in the manner of a private player within it, the foreign sovereign's actions are "commercial" [...]. The issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the type of actions by which a private party engages in "trade and traffic or commerce". Thus, a foreign government's issuance of regulations limiting foreign currency exchange is a sovereign activity; whereas a contract to buy army boots or even bullets is a "commercial"*

presencia de una tercera categoría en donde el Estado es el deudor de una obligación judicial en contra de otro Estado; obligación que no es un acto soberano ni comercial, pero que existe y merece protección legal. Por esto, se puede decir que el fallo del Noveno Circuito *México vs Woods*[145] no permanece sin crítica. En efecto, los magistrados federales basaron su decisión en contra de México sobre el fallo *Monaco vs Mississipi* que enunció la inadmissibilidad de la acción mexicana por la inmunidad. En efecto, el caso Monaco concernió una demanda promovida por un Estado (Monaco) contra la entidad federativa de Mississipi al respecto de un asunto comercial. Sin embargo, los casos de los mexicanos condenados no entran en la distinción entre asuntos *de jure imperii* o *de jure gestionis*. Como lo notó Lori Fisler Damrosch, la argumentación de la Suprema Corte en el caso *Breard* retomando también el precedente *Monaco vs Mississippi* no puede ser aprobado porque "*Breard* trató de la cuestión de la inmunidad en presencia de contratos comerciales, y no de una cuestión involucrando tratados internacionales". Como el autor subraya,

> *[R]ather than concluding that federal courts lack authority to entertain suits of this sort, the amendment should be construed as providing a federal forum for enforcing federal treaty obligations against state officials*"[146].

93. En realidad, la cuestión de la inmunidad no se presenta en los términos planteados por las sentencias precitadas. En efecto, la Enmienda XIV dispone que:

> *No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due*

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activity, because private companies can similarly use sales contracts to acquire goods" (*Republic of Argentina vs. Weltover, Inc.*, 504 United States 607 (1992), consegrando así la doctrina desarrollada por le Corte suprema italiana *Stato di Rumania vs. Trutta* (*Foro Italiano*, 1926.584, *AJIL*, 1932.626).

[145] 126 F. 3d 1220 (9th Cir. 1997).

[146] The Justiciability of Paraguay's Claim of Treaty Violation, *AJIL*, 1998, p 697.

process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

94. En el asunto que nos interesa, si se considera que la Corte no puede ordenar la suspensión de la ejecución en razón de la inmunidad de la entidad federativa, la disposición constitucional precitada sobre el *due process* se quedaría vana y no le permitiría al Estado – como persona aunque sea una persona moral - de gozar de su derecho confirmado por la Corte Internacional de Justicia, consistente en que sus nacionales sean sometidos al *due process*, que incluye la facultad de contactar a su consulado en aplicación de un tratado internacional ratificado por los Estados Unidos y aplicable también en los Estados federativos en virtud de la *Supremacy Clause*[147].

95. Como punto final, es relevante observar que sería absurdo que el derecho americano, como por ejemplo a través del *Torture Victim Act* o del *Alien Tort Claims Act*[148], permitiera demandar ante una Corte americana un Estado extranjero por violaciones del derecho internacional, pero que el mismo razonamiento no se aplique *mutatis mutandis* cuando los Estados Unidos violan el derecho internacional en perjuicio de un Estado extranjero como México.

b) Afirmación de los criterios de competencia

96. En primer lugar es importante observar que no hay *per se* un obstáculo para que un Estado extranjero inicie acciones en los

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[147] Por analogía: "In *Fitzpatrick* v. *Bitzer*, 427 U. S. 445 (1976), we [the Supreme Court] recognized that "the Eleventh Amendment, and the principle of state sovereignty which it embodies, are necessarily limited by the enforcement provisions of §5 of the Fourteenth Amendment".

[148] Para ver varios ejemplos, *cf* Kruse & Benavides, Subject Matter Jurisdiction in Federal Court in International Cases, *in*: Levy, *International Litigation*, ABA, 2003, p. 133, 139.

tribunales americanos[149], no obstante el principio *par in parem non habet imperium*[150]*:*

> *Under principles of comity governing this country's relations with other nations, sovereign states are allowed [376 U.S. 398, 409] to sue in the courts of the United States,* The Sapphire*, 11 Wall. 164, 167;* Guaranty Trust Co. v. United States*, 304 U.S. 126, 134. [The] privilege of suit has been denied only to governments at war with the United States,* Ex parte Don Ascanio Colonna*, 314 U.S. 510 ; see 7 of the Trading with the Enemy Act, 40 Stat. 416, 417, 50 U.S.C. App. 7; cf.* Hanger vs Abbott*, 6 Wall. 532;* Caperton vs Bowyer*, 14 Wall. 216, 236, or to those not recognized by this country,* The Penza*, 277 F. 91;* Russian Republic vs Cibrario*, supra. 11 [376 U.S. 398, 410]*[151].

97. Si al menos en dos ocasiones las cortes federales han juzgado que no hay una "violación continua del derecho internacional", en los casos de los condenados a muerte que no habían sido informados de sus derechos consulares[152] en el sentido de la doctrina *Ex parte Young*[153], eso no quiere decir que no haya otras posibilidades. En este sentido nos parece mayor estrategia basar la jurisdicción federal sobre la *Common Law of Foreign Relations* (1). Fuera también vano tal criterio de competencia, quedaría aún la posibilidad de solicitar al gobierno federal americano ordenar a los tribunales federales de tomar el asunto (2).

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[149] *Pfizer, Inc. vs India*, 434 U.S. 308 (1978); *Banco Nacional de Cuba vs Sabbatino*, 376 U.S. 398 (1964). También véase: *Argentina vs New York*, 25 NY 2d. 929 (NY 1969); *Finland vs Pelma*, 270 NYS 2d 661 (NY App. Div. 1966).

[150] Véase la jurisprudencia inglesa *Parlament Belge* (1880) 5 PD 197, tradicionalmente citada sobre este tema.

[151] Citado por *Sabbatino*, *op.cit.*; *United States v. Rosenthal*, 793 F2d. 1214, 1232 (11th Cir 1996); *Matta-Ballestros vs Henman*, 896 F2d. 255, 259 (7th Cir. 1990).

[152] *United Mexican States vs Woods*, 126 F. 3d 1220 (9th Cir. 1997); *Paraguay vs Allen*, 134 F. 3d 622 (4th Cir. 1998); *Consulate General of México vs Phillips*, 17 F. Supp. 2d 1318 (SDFl 1998).

[153] 209 U.S. 123 (1908).

1. Common Law of Foreign Relations

98. La *Common Law of Foreign Relations* puede constituir la base legal para promover una acción ante los tribunales federales bajo el 28 USC 1331[154]. Como lo enuncia el *Restatement (Third) of the Foreign Relations Law of the United States,* "la interpretación del derecho internacional presenta cuestiones federales"[155] y, de manera más amplia también "cualquier legislación local que impacta la conducta internacional de los Estados Unidos o tiene otras consecuencias internacionales"[156]. El precedente *Sabatino* no puede ser más claro:

> *However, we are constrained to make it clear that an issue concerned with a basic choice regarding the competence and function of the Judiciary and the National Executive in ordering our relationships with other members of the international community must be treated exclusively as an aspect of federal law…[Rules of international law should not be left to divergent and perhaps parochial state interpretations.*

99. In *Radcliff Materials*, la Suprema Corte explicó que la *Federal Common Law* se aplica en casos en donde están involucrados las relaciones de los Estados Unidos con naciones extranjeras[157].

100. No cabe duda que la interpretación y la aplicación de la Convención de Viena sobre Relaciones Consulares constituye un asunto que implica las relaciones internacionales de los Estados Unidos con otros Estados, y permite al gobierno federal intervenir directamente en el asunto.

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[154] "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States".

[155] # 112 (2).

[156] Restament, # 1.

[157] *Texas Inc vs Radcliff Materials*, 451 U.S. 630 (1981). Véase también por ejemplo: *Republic of Phillipines vs Marcos*, 806 F.2d 344 (2d Cir. 1986); cert. denied, 481 U.S. 1048 (1987). Para un estudio más completo sobre el tema: Kruse & Benavides, *op.cit.*, p. 143.

2. Por orden del poder ejecutivo

101. Si aún no fuera suficiente para establecer la jurisdicción federal, otra posibilidad consistiría en pedir al ejecutivo federal americano recomendar a la Suprema Corte tomar el caso no obstante la presupuesta inmunidad. El precedente en la materia es la *Bernstein letter* del Procurador Jack Tate que permitió al Segundo Circuito pronunciarse no obstante la doctrina del *Act of State*[158] en razón de un "*supervening expression of Executive Policy*":

> *It is realized that a shift in policy by the executive cannot control the courts but it is felt that the courts are less likely to allow a plea of sovereign immunity where the executive has declined to do so. There have been indications that at least some Justices of the Supreme Court feel that in this matter courts should follow the branch of the Government charged with responsibility for the conduct of foreign relations*[159],

independientemente del hecho que el gobierno federal tiene un poder propio de demandar a las entidades federativas por violaciones del derecho internacional[160]. En el caso *Minnesota*[161], varias tribus de indios demandaron a la entidad federativa por vender tierras que según el tratado hecho entre las tribus y el gobierno federal pertenecían a estas primeras. El Estado de Missouri contestó que el gobierno federal no puede iniciar una acción federal contra el Estado local porque no tiene interés jurídico; que el *locus standing* pertenece a las tribus y no al gobierno federal. Sin embargo, la Corte suprema replicó que los Estados Unidos tienen un interés como soberano en "iniciar una acción en equidad ("*equity*") para obtener la ayuda de la Corte para remover cualquier obstáculo ilegal que contravenga el cumplimiento de las obligaciones del gobierno federal". No es difícil de ver la similitud con los casos que nos ocupan y la vía del *equity* sería la que permitiría también al gobierno federal de pedir a la jurisdicción federal de obligar a las entidades federativas a cumplir con la Convención de Viena, no

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[158] Bernstein vs NV Nederlansche-Amerikaansche Stoomvaart-Maatschappij, 173 F.2d 71 (2d Cir. 1949).

[159] 210 F2d 375 (1954).

[160] *United States vs Arlington County*, 669 F.2d 925 (4th Cir.), cert. denied, 459 U.S. 801 (1982); *United States vs City of Glen Cove*, 322 F.Supp. 149 (E.D.N.Y.), aff'd on opinion below, 450 F.2d 884 (2d Cir. 1971); *Sanitary Dist. vs United States*, 262 U.S. 405 (1925).

[161] United States vs Minnesota, 270 U.S. 181 (1926).

obstante que se trata también de derechos propios perteneciendo tal cual a las víctimas de la no-información sobre los derechos consulares.

Sección 2: El derecho propio del individuo extranjero

102. Si bien es cierto que tradicionalmente se debería considerar que las decisiones de la Corte Internacional de Justicia otorgan exclusivamente derechos a los Estados en virtud del efecto de la protección diplomática sobre la naturaleza de la reclamación[162], tal análisis nos parece no obstante contrario a la práctica contemporánea[163]. En efecto, las personas físicas son sujetos derivados del Derecho internacional, y su imposibilidad a traer por si mismo ante los órganos internacionales sus reclamaciones no es debida a su "inexistencia jurídica" sino a su incapacidad legal de promover acciones internacionales[164]. Visto bajo este ángulo, el Estado ejerce con su capacidad propia la acción en la representación de la persona física, como se puede ver en el caso *LaGrand*, en donde Alemania presentó su acción en defensa de sus propios derechos así como en defensa de los derechos propios de los hermanos LaGrand. En otras palabras, el extranjero tiene un derecho individual (A) sin que por lo tanto que se trate de un derecho humano (B).

A – Un derecho individual…

103. El derecho individual no tiene sólo su origen en el derecho internacional (a) sino también existe en el derecho americano a través de la doctrina de la auto-aplicabilidad (b).

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[162] *Supra* #94.

[163] Kelsen ya se pronuncio en este sentido: *Théorie pure du Droit*, Paris, 1962.429.

[164] Leben, Retour sur la notion de contrat d'Etat et sur le droit applicable à celui-ci, *Mélanges Thierry*, Paris, 1998. 247, 265, nota 49 ; Combacau & Sur, *op. cit,* p.315 sq; Lauterpacht, The Subjects of Law of Nations, *Law Quarterly Review*, 1947.438, 455. Pierre-Marie Dupuy también enuncia que la persona privado es "jurídicamente incapaz" (subrayado por nosotros) de obtener reparación de su perjuicio en el orden internacional (*Droit international public*, 4° ed., Paris, Dalloz, 1998, #471, p. 431).

a) En virtud del derecho internacional

104. Pese a los argumentos por parte de los americanos, no cabe duda que la Convención de Viena confiere derechos individuales. Como lo dijo malenciosamente el Profesor Simma en su *playdorie* en el asunto *LaGrand*:

> *Why something which looks like an individual right, feels like an individual right and smells like an individual right should be anything else but an individual right*?

Y la Corte internacional de Justicia concluyó que el artículo 36.1 de la Convención de Viena sobre Relaciones Consulares otorga derechos individuales, que pueden ser invocados por el Estado nacional ante la Corte Internacional de Justicia:

> *Based on the text of these provisions, the Court concludes that Article 36, paragraph 1, creates individual rights, which, by virtue of Article I of the Optional Protocol, may be invoked in this Court by the national State of the detained person*;

consecuentemente los derechos que nacen de la acción internacional entran en el patrimonio jurídico del individuo. Es menester subrayar que la Corte interamericana de Derechos Humanos se pronunció en el mismo sentido:

> [82.] Los derechos mencionados en el párrafo anterior, que han sido reconocidos por la comunidad internacional en el Conjunto de Principios para la Protección de todas las Personas Sometidas a cualquier forma de Detención o Prisión, tienen la característica de que su titular es el individuo. En efecto, el precepto es inequívoco al expresar que "reconoce" los derechos de información y notificación consular a la persona interesada. En esto, el artículo 36 constituye una notable excepción con respecto a la naturaleza, esencialmente estatal, de los derechos y obligaciones consagrados en la Convención de Viena sobre Relaciones Consulares y representa, en los términos en que lo interpreta esta Corte en la presente Opinión Consultiva, un notable avance respecto de las concepciones tradicionales del Derecho Internacional sobre la materia.
>
> […]

> Como se desprende del texto, el ejercicio de este derecho sólo está limitado por la voluntad del individuo, que puede oponerse "expresamente" a cualquier intervención del funcionario consular en su auxilio. Esta última circunstancia reafirma la naturaleza individual de los referidos derechos reconocidos en el artículo 36 de la Convención de Viena sobre Relaciones Consulares.
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> [84]. Por lo tanto, la Corte concluye que el artículo 36 de la Convención de Viena sobre Relaciones Consulares reconoce al detenido extranjero derechos individuales a los que corresponden los deberes correlativos a cargo del Estado receptor. Esta interpretación se confirma por la historia legislativa del artículo citado. De ésta se desprende que aun cuando en un principio algunos Estados consideraron que era inadecuado incluir formulaciones respecto de los derechos que asistían a nacionales del Estado que envía, al final se estimó que no existía obstáculo alguno para reconocer derechos al individuo en dicho instrumento[166].

105. Y los Estados Unidos comparten *nolens volens* la misma postura. En efecto, en el asunto de los *Rehenes en Teherán*[167], en sus argumentos orales ante la Corte Internacional de Justicia, los Estados Unidos invocaron, en un momento dado, la disposición de la Convención de Viena sobre Relaciones Consulares de 1963 que obliga el Estado receptor de permitir a las autoridades consulares del Estado de origen que "se comuniquen de manera libre con sus nacionales y tengan acceso a ellos"[168]. En la fase escrita del proceso, los Estados Unidos, en su *mémoire*, después de señalar que, en las circunstancias del *cas d'espèce*, los nacionales norteamericanos habían sido detenidos incomunicados "en violación de las más flagrantes de las normas consulares y de los estándares aceptados de derechos humanos", agregaron, con todo énfasis, que el artículo 36 de la Convención de Viena sobre Relaciones Consulares de 1963 establece

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[166] Aviso #18**,** *Condición Jurídica y Derechos de los Migrantes Indocumentados*, 17/9/2003.

[167] CIJ, Hostages (U.S. Diplomatic and Consular Staff) in Tehran case, 1979.

[168] CIJ, *Hostages (U.S. Diplomatic and Consular Staff) in Tehran case*, 1979; Pleadings, Oral Arguments, Documents; Argument of Mr. Civiletti (counsel for the United States), p. 23.

> *Rights not only for the consular officer but, perhaps even more importantly, for the nationals of the sending State who are assured access to consular officers and through them to others*[169].

Y, a la mejor de manera involuntaria, reiteraron en su *mémoire* la misma posición en LaGrand:

> *"United States and Germany agree with respect to two central matters in the case. First, we agree that the Consular Convention required the competent authorities to inform Walter and Karl LaGrand without delay that each had a right to have those authorities notify German consular officials of his arrest. And second, we agree that the competent authorities did not inform either of the LaGrands of this right*".

b) En virtud del derecho nacional

106. Las sentencias de la Corte Internacional de Justicia pueden ser *self-executing*, según lo establecido en la decisión de la Corte Permanente de Justicia Internacional en el caso *Dantzig*[174] con relación en los tratados internacionales. Si una norma convencional es sumamente precisa como para no necesitar actos normativos internos para su aplicación, entonces ella puede ser invocada inmediatamente ante el juez nacional. La observación de la Presidencia americana en su *amicus curiae* que una norma *self-executing* no se confunde con un derecho individual – basándose por eso sobre el *Restatement the Third of Foreign Relations Law*[175]-, sino que significa únicamente que la norma internacional no requiere ningún acta legislativo para implementarse en el derecho local[176], es inconsistente porque contradictorio. En efecto, si la Convención otorga a la persona arrestada el derecho de comunicarse con el consulado, y si esta norma es *self-executing*, como lo sostiene el propio Presidente de los

[169] *Idem*, p. 174.

[174] CPJI, 3/3/28, *serie B*, #15, p.18.

[175] Whether a treaty is self-executing is a question distinct from whether the treaty creates private rights or remedies (§111).

[176] *Op. cit.*, p. 27.

Estados Unidos, entonces es lógicamente también un derecho individual[177].

107. Transpuesto al fallo *Avena*, se verifica que la decisión de la Corte Internacional de Justicia establece disposiciones claras que no necesitan de ningún acta normativa local [178]. Los condenados extranjeros con penas severas tienen el derecho a la revisión de su caso; y corresponde al juez de acordarla sobre el fundamento de la sentencia internacional y la jurisprudencia nacional *Foster Elam v. Neilson*[179], consagrando la teoría de la aplicación inmediata. En el mismo sentido se pronunció la Suprema Corte de los Estados Unidos en el *Head Money Cases*[180]:

> *[A] treaty, then, is a law of the land as an Act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. And when such rights are of a nature to be enforced in a court of justice, the court resorts to the treaty for a rule of decision for the case before it, as it would to a statute.*

Sin embargo, el análisis del *amicus curiae* presidencial es distinto en la medida que sostiene que el artículo 94 (2) de la Carta de las Naciones Unidas prevé que en caso que el Estado condenado no cumple con la sentencia de la Corte internacional, el Estado interesado puede pedir al Consejo de Seguridad de tomar las medidas necesarias[181]. El Circuito del Distrito de Colombia también interpretó el precitado artículo de la Carta de las Naciones Unidas en el sentido que no fuera posible para los justiciables de invocar directamente una

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[177] Véase por ejemplo: CEDH, *Vermeire vs Belgica*, 29/11/1991; Daillier & Pellet, *Droit international public*, 6 ed., 1999, #150.

[178] También en este sentido: Hoss, A l'ouest, rien de nouveau? L'affaire Valdez devant la Cour d'appel de l'Etat d'Oklahoma à la lumière du Droit international, *RGDIP*, 2003.401, 407 ; Henkin, Provisional Measures, United States Treaty Obligations, and the States, *AJIL*, 1998. 666 ; Vazquez, *loc. cit*., p. 686.

[179] 253 U.S. 1829.

[180] *Edve vs Robertson*, 112 U.S. 580 (1884).

[181] *Op.cit.*, p. 35.

sentencia de la Corte internacional[182]. Sin embargo, el primer argumento no tiene peso porque esta fuera de contexto. La mencionada disposición del artículo 94 establece lo que los Estados en su relación interestatal pueden hacer, y de ninguna manera se pronuncia sobre el efecto de las sentencias internacionales en el orden jurídico nacional[183]. Con respecto a la decisión de la Corte de Circuito, *in casu* la sentencia de la Corte internacional[184] no fue una decisión autoaplicable.

108. En realidad, como lo dispone el *Restatement (Third) of the Foreign Relations Law of the United States* en su *Reporter's note* 5:

> *[If] the Executive branch has not requested implementing legislation and Congress has not enacted such legislation, there is a strong presumption that the treaty has been considered self-executing by the political branches, and should be considered self-executing by the courts*[186].

El Departamento de Estado en su *amicus curiae* expresa que el fallo Avena permite a los Estados Unidos de cumplir con la sentencia a través medidas que ellos pueden libremente elegir; invocar la sentencia directamente ante los tribunales privaría al país de la libertad de elegir sus opciones[187]. El razonamiento puede ser justo; sin embargo, es también cierto que no había ninguna reacción "política" a los fallos *Paraguay vs United States, Germany vs United States* y ahora *Mexico vs United States*, y por lo tanto resulta que la sentencia *Avena* como complemento interpretativo a la Convención de Viena

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[182] Committee of United States Citizens Living in Nicaragua vs Reagan, 859 F.2d 929 (DC Cir. 1988).

[183] El argumento que en el momento de ratificar el Senado americano interpretó el artículo 94(2) en el sentido que los Estados tienen solo una obligación "moral" de cumplir con la sentencia y que la mencionada disposición fuera la única opción para una ejecución coactiva (*Amicus curiae* presidencial, *op.cit*., p. 36, nota 9) constituye solo un argumento subjetivo y no necesariamente refleja la opinión de los demás sobre esta cuestión. En realidad no cabe duda que la ejecución de una sentencia de la Corte de La Haya es mandataria.

[184] CIJ, meritos, Activités militaires et paramilitaires au Nicaruaga et contre celui-ci, 27/61986.

[186] Véase también: Paust, Self-executing Treaties, 82 *AJIL* 760, 775 (1988); *McKesson Corp vs The Islamic Republic of Iran* (DDC 1993); *Rainbow Navigation, Inc vs Department of the Navy*, 686 F.Supp. 354, 357 (DDC 1988).

[187] *Op.cit*., pp. 37-38.

tiene que ser considerada como "*self-executing*". En la decisión de la Corte de Apelación de Oklahoma en relación con la solicitud de revisión del procedimiento promovido por Osvaldo Torres, el Juez Chapel en su opinión concurrente enunció:

> *This Court is bound by the treaty itself, we are bound to give full faith and credit to the Avena decision. [The] State Department has consistently taken the position that the only remedies under the Vienna Convention are diplomatic, political, or exist between states under international law. ...the State Department has also consistently turned to the International Court of Justice to provide a binding resolution of disputes under the Vienna Convention, and has relied on the binding nature of International Court of Justice decisions to enforce United States rights under the Convention. The Avena decision mandates a remedy for a particular violation of Torres's, and México's rights under the Vienna Convention*[188].

109. Sin embargo, varias cortes americanas persisten en considerar que el artículo 36 no establece derechos personales[189], no obstante que otros tribunales establecen claramente que si la mencionada disposición otorga derechos a favor de los extranjeros:

> *In sum, the language of the VCCR, coupled with its 'legislative history' and subsequent operation, suggest that Article 36 of the Vienna Convention was intended to provide a private right of action to individuals detained by foreign officials*[190]*,*

obligando a los tribunales de asegurar el respecto de estas disposiciones[191] (además, a seguir *United States v. Verdugo-Urguidez*[192],

[188] Sentencia del 13 de mayo de 2004 precitada.

[189] *Medellin vs Dretke*, #03-20687 (5th Cir. 2004); *United States vs Emuegbunam*, 268 F.3d 377, 391 (6th Cir. 2001); *United States vs Jimenez-Nava*, 243 F3d 195 (5th Cir. 2001). Véase también: *United States vs Santos*, 235 F.3d 1105, 1107-08 (8th Cir. 2000).

[190] *Jogi v. Voges*, No 01-1657 (7th Cir. 2005); *Standt vs City of New York*, 153 F. Supp. 2d 417, 427 (SDNY 2001); *United States vs Chaparro-Alcantara*, 37 F. Supp. 2d 1122, 1125 (CD Ill. 1999): "*[Defendants] have an individual right to consular notification under Article 36 which in turn grants them standing to object to a violation of that provision*"; *United States vs $69, 350 in United States Currency*, 22 F. Supp. 2d 593 (WDTex. 1998); *United States vs Rangel-Gonzales*, 617 F.2d 529 (9th Cir. 1980).

[191] *United States vs Rauscher*, 119 U.S. 407, 418 (1886); *United States vs Alvarez-Machain*, 504 U.S. 644, 659 (1992); *State of Ohio vs Ramirez*, 1999 WL 1313670 (Ohio Ct. App. 11 Dist., 1999).

en el presupuesto que existe una reclamación oficial de un Estado en relación con la violación de un tratado internacional que perjudica al nacional, este último tiene automáticamente el *locus standing* y un derecho derivado que le permite buscar una reparación legal). Sin embargo, no se queda claro, cual tiene que ser la consecuencia legal de la violación[193]. La posición de la mayoría de los jueces consiste a condicionar el otorgamiento de la revisión a la prueba que la ausencia de notificación de los derechos consulares ha perjudicado al condenado de manera seria en su defensa, tal como establecido en el fallo *Esparza*[194]. Como lo escribió el Noveno Circuito en *Lombara*:

> *At the present time, we believe the most reasonable approach is to place the burden on the defendant to show he was prejudiced as a result of the violation. One commentator has concluded that "a foreign national is inherently prejudiced when detained or in custody in a foreign criminal justice system. A consul's assistance can place him on par with a non-foreigner." Mark J. Kadish, Article 26 of the Vienna Convention on Consular Relations: A Search for the Right to Consul , 18 Mich. J. Int'l L. 565,606 (1997). We believe, however, that unless after time it proves ineffective in inducing compliance with the Vienna Convention, the determination of prejudice is a question of fact dependent on the circumstances of the individual case*[195].

En el asunto *Li*[196], el Presidente Torruella del Primer Circuito opino lo siguiente:

> *I have some difficulty envisioning how it is possible to frame language that more unequivocally establishes that the protections of Article 36(1)(b) belong to the individual national, and that the failure to promptly notify him/her of these rights constitutes a violation of these entitlements by the detaining authority. I must also confess to no small amount of bafflement, not to say disappointment, with the*

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[192] 939 F.2d 1341, 1356 (9th Cir 1991).

[193] El hecho que un tratado no prevé una sanción especifica para la violación no es una causa justificada para no tomar en cuenta la mencionada violación (*Hanoch Tel Oren vs Libyan Arab Republic*, 726 F2d. 774 (1984).

[194] *Supra* nota 56; *Faulder vs Johnson*, 81 F3d. 515 (5th Cir. 1996) (no se debe anular un juicio si la violación constituye un "*harmless error*"; *United States vs Calderon-Medina*, 591 F2d. 529 (9th Cir. 1979).

[195] *Supra* nota 58.

[196] *United States vs Li*, 206 F3d. 56 (1st Cir 2000).

> *reluctance demonstrated by my colleagues in the majority, as well as other courts, in refusing to provide a forum for the vindication of what amounts to a confessed and flagrant violation of our national law by the Government. I would ask, what arena is more appropriate than the courts of the United States, for an individual to seek the validation of his/her rights against Governmental transgression of its own laws and regulations?. . . I am at a loss to find rhyme or reason in the majority's conclusions.*

El séptimo Circuito por su parte, decidió que al menos la violación de la Convención abre la vía a la indemnización. Considerando, después de haber discutido todos los fallos anteriores de los varios Circuitos, que los derechos consulares son derechos individuales autoaplicables, su no respecto debe dar a indemnización, en especial que actualmente según la posición de los demás tribunales no existe ninguna otra reparación como por ejemplo la revisión procesal del caso[197].

110. En el mismo tiempo unas cortes locales sin embargo estiman que no es posible equiparar la violación de los derechos consulares a la violación de los derechos del acusado tal como está definido por la doctrina *Miranda*[198]. Es así que el Octavo Circuito tuvo que pronunciarse sobre el caso en donde las personas arrestadas reconocieron entender sus derechos Miranda, pero aceptaron declarar ante las autoridades y sin abogado[199]. Después de su condena, alegaron que nunca hubieran hecho las declaraciones si hubieron podido contactar a su consulado; el argumento consistió a sostener que a lo mejor el consulado hubiera recomendado no declarar. Sin embargo, los magistrados federales consideraron que se trataba de una mera especulación y que no había ninguna relación causal entre la no-notificación de la Convención de Viena y la renuncia a los derechos Miranda, que les fue claramente expuesta y que

[197] *Jogi v. Voges*, No 01-1657 (7th Cir. 2005).

[198] *State vs Chavez*, 19 P. 2d 923 (Or. 2001); *Zavala vs State*, 739 NE 2d 135 (Ind. 2001).

[199] Sin embargo, aun que a la persona arrestada se leyeron los derechos Miranda en su idioma nativo, es cierto que la traducción no siempre es adecuada; por ejemplo a un nacional mexicano, el traductor oficial la policía dijo en español lo siguiente (tal como retranscrito por la Corte in inglés): *Ah, you have the right that something that you can use against yourself in a court of law. You have absolutely on the right hand side to stay in silence, if you prefer. You have the right hand side to [non-word] to an attorney before and also you have the right hand side for the presence of an attorney here with you during the questions and also if you can't pay for an attorney, it is possible for having an attorney…without paying before the questions, O.K.?*" (*State vs Ramirez*, 732 N.E.2d 1065, 1068 (1999 Ohio App.).

entendieron perfectamente[200, 201]. De la misma manera, ya es casi una jurisprudencia constante que la violación de la Convención sobre Relaciones Consulares no puede tener por efecto la supresión de ciertas declaraciones o pruebas[202].

111. Recientemente, la Corte constitucional alemana a su vez estableció que el artículo 36 de la Convención de Viena es una norma auto

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[200] *United States vs Ortiz*, 315 F.3d 873 (8th Cir. 2002): *Consul Negret does not say that he would have advised appellants not to make their statements to the police. No doubt he would have informed them of their rights, including the right to obtain counsel, and would have done so in Spanish. But they had already been adequately informed of this right. There is no evidence that receiving this information from the consul would have changed their conduct. In other words, there is no evidence that defendants, if they had been given proper consular access, would have chosen not to waive their Miranda rights. So far as we can tell, the course of the trial would not have been changed at all. Furthermore, the Vienna Convention does not require that interrogation cease until consular contact is made. The interrogation in this case occurred on a Sunday. If defendants had been allowed to telephone the consul, they could not have reached him. The most that could have been done was to leave a message on the consulate's voice mail, and the consul would have returned the call the next day. By that time, defendants, fully informed of their rights under Miranda, had already confessed. In other words, defendants have shown no prejudice, and therefore the violation of the Vienna Convention is of no avail to them, even if the violation is assertable by an individual detained person*.

Sin embargo, al Circuito de añadir:

Courts have no authority to enforce the law, including treaties, in a vacuum, so to speak. Our job is simply to decide the cases that come before United States, and to do so in a way that is just as between the parties. That the Convention was violated in these cases is not something to be proud of. The position of the Kansas City Police Department, apparently determining as a matter of policy that no notification of rights under the Convention will ever be made, is disturbing, to say the least. "Great nations, like great men, should keep their word." Federal Power Commission vs Tuscarora Indian Nation*, 362 U.S. 99, 142 (1960) (Black, J., dissenting). Although the Department of State has made an effort in recent years to advise federal, state, and local law enforcement agencies how to comply with Article 36(b)(1), prior cases demonstrate that this nation's overall compliance record leaves a good deal to be desired. This fact, however, does not automatically translate into relief for particular defendants in particular cases*.

[201] Es con razón que varias jurisdicciones han rechazado eliminar confesionales obtenidas, según los condenados, en violación de sus derechos consulares, porque no había violación de la Quinta Enmienda y la regla subsiguiente Miranda. En efecto, la violación de la Convención de Viena no implica *per se* la eliminación de confesionales o pruebas (*cf* : *United States vs Felix-Felix*, 275 F.3d 627, 635 (7th Cir. 2001); *Bell vs Commonwealth*, 563 S.E. 2d 695, 707 (Va. 2002).

[202] *Lombera* (2000) precitado, nota 56; *Li*, precitado, nota 174. Contra: *State of Delaware vs David Reyes*, 740 A2d. 7 (Del. 1999): supresión de todas las declaraciones de un nacional guatemalteco hechas sin haber sido notificado de sus derechos consulares.

aplicable que no requiere ninguna implementación por legislación nacional, y constituye un derecho individual.[203] Esta decisión toma el contrapié del fallo *Sanchez-Llamas* rendido por la Suprema Corte americana - y objeto de un estudio minucioso por parte de los magistrados alemanes – decidiendo que no hay lugar a suprimir pruebas obtenidas en violación del mencionado artículo 36[204].

112. En otras palabras, no queda ninguna duda que el procedimiento penal de los condenados en violación de sus derechos consulares tiene que ser revisado[205]. Sin embargo, el derecho a revisión no constituye un derecho humano, tal como lo planteó México, entre otros, ante la OEA.

B – …pero no un derecho humano

113. En su primera solicitud de aviso ante la Corte Interamericana de los Derechos Humanos, México solicitó a la Corte que interpretara si en el marco del artículo 64.1 de la Convención Interamericana sobre Derechos Humanos, debe entenderse el artículo 36 de la Convención de Viena en el sentido de contener disposiciones concernientes a la protección de los derechos humanos en los Estados Americanos. Según la Corte, la formulación de la cuestión de México no quedó muy clara y consecuentemente la Corte reformuló la pregunta en el sentido que se trata no sobre que el objeto principal de la Convención de Viena es la protección de los derechos humanos, sino si una norma de ésta está relacionada con la dicha protección, lo cual adquiere relevancia a la luz de la jurisprudencia consultiva de este Tribunal, que ha interpretado que un tratado puede estar relacionada con la protección de los derechos humanos, con independencia de cuál sea su objeto principal . En este sentido, los apartados b) y c) del artículo 36.1 de la Convención de Viena se refieren a la asistencia consular en una situación particular: la privación de libertad. Por lo

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[203] Case 2 BVG 2115/01, *ASIL*, 2007.627, comentario Garditz.

[204] *Moises Sanchez-Llamas, Petitioner v. Oregon; Mario A. Bustillo, Petitioner V. Gene M. Johnson, Director, Virginia* , 28/6/06.

[205] Cassel, *op.cit*., p. 21.

tanto, la Corte concluyó que el artículo 36 reconoce al detenido extranjero derechos individuales a los que corresponden los deberes correlativos a cargo del Estado receptor. Esta interpretación se confirma por la historia legislativa del artículo citado. De ésta se desprende que aún cuando en un principio algunos Estados consideraron que era inadecuado incluir formulaciones con respecto a derechos para los nacionales del Estado de origen, al final se estimó que no existía obstáculo alguno para reconocer tales derechos. Si el Estado que envía decide brindar su auxilio, en ejercicio de los derechos que le confiere el artículo 36 de la Convención de Viena sobre Relaciones Consulares, podrá asistir al detenido en diversos actos de defensa, como el otorgamiento o contratación de patrocinios letrados, la obtención de pruebas en el país de origen, la verificación de las condiciones en que se ejerce la asistencia legal y la observación de la situación que guarda el procesado mientras se halla en prisión. Por lo tanto, la Corte terminó en establecer que la comunicación consular a la que se refiere el artículo 36 de la Convención de Viena, efectivamente está relacionado con la protección de los derechos del nacional del Estado que envía y puede redundar en beneficio de aquél. Esta es la interpretación que debe darse a las funciones de “protección de los intereses” de dicho nacional y a la posibilidad de que éste reciba “ayuda y asistencia”, en particular, en la organización de “su defensa ante los tribunales”.

114. México también planteó a la Corte la pregunta sobre el vínculo que podría existir entre el derecho a la información sobre la asistencia consular y los derechos inherentes a la persona reconocidos en el Pacto Internacional de Derechos Civiles y Políticos y la Declaración Americana sobre Derechos Humanos, y, a través de esta última, en la Carta de la OEA. La Corte recordó que el Pacto Internacional de Derechos Civiles y Políticos consagra en el artículo 14 el derecho al debido proceso legal derivado de “la dignidad inherente a la persona humana”. Esa norma señala diversas garantías aplicables a “toda persona acusada de un delito”, y en tal sentido coincide con los principales instrumentos internacionales sobre derechos humanos. En la opinión de la Corte, para que exista “debido proceso legal” es preciso que un justiciable pueda hacer valer sus derechos y defender sus intereses en forma efectiva y en condiciones de igualdad procesal con otros justiciables. Al efecto, es útil recordar que el proceso es un

medio para asegurar, en la mayor medida posible, la solución justa de una controversia. A ese fin atiende el conjunto de actos de diversas características generalmente reunidos bajo el concepto de debido proceso legal. El desarrollo histórico del proceso, consecuente con la protección del individuo y la realización de la justicia, ha traído consigo la incorporación de nuevos derechos procesales. Son ejemplos de este carácter evolutivo del proceso los derechos a no autoincriminarse y a declarar en presencia de abogado, que hoy día figuran en la legislación y en la jurisprudencia de los sistemas jurídicos más avanzados. Es así como se ha establecido, en forma progresiva, el aparato de las garantías judiciales que recoge el artículo 14 del Pacto Internacional de Derechos Civiles y Políticos, al que pueden y deben agregarse, bajo el mismo concepto, otras garantías aportadas por diversos instrumentos del Derecho Internacional. En este orden de consideraciones, la Corte ha dicho que los requisitos que deben ser observados en las instancias procesales para que pueda hablarse de verdaderas y propias garantías judiciales [206], "sirven para proteger, asegurar o hacer valer la titularidad o el ejercicio de un derecho"[207] y son "condiciones que deben cumplirse para asegurar la adecuada defensa de aquéllos cuyos derechos u obligaciones están bajo consideración judicial"[208]. Para alcanzar sus objetivos, el proceso debe reconocer y resolver los factores de desigualdad real de quienes son llevados ante la justicia. Es así como se atiende el principio de igualdad ante la ley y los tribunales[209] y a la correlativa prohibición de discriminación. La presencia de condiciones de desigualdad real obliga a adoptar medidas de compensación que contribuyan a reducir o eliminar los obstáculos y deficiencias que impidan o reduzcan la defensa eficaz de los propios intereses. Si no existieran esos medios de compensación, ampliamente reconocidos en diversas vertientes del

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[206] Opinión Consultiva, *Garantías judiciales en estados de emergencia*, OC-9/87, 6/10/87, serie A No. 9.

[207] Opinión Consultiva, *El Hábeas Corpus bajo suspensión de garantías*, OC-8/87, 30/1/87, serie A No. 8.

[208] *Garantías judiciales en estados de emergencia, op.cit. Cf* también. *Caso Genie Lacayo,* 29/1/97, serie C No. 30; *Caso Loayza Tamayo,* 17/9/97, serie C No. 33.

[209] *Cf* Declaración Interamericana sobre Derechos Humanos, art. II y XVIII; Declaración Universal sobre Derechos Humanos, art. 7 y 10; Pacto Internacional de Derechos Civiles y Políticos, art. 2.1, 3 y 26; Convención para la Eliminación de Todas las Formas de Discriminación Contra la Mujer, art. 2 y 15; Convención Internacional sobre la Eliminación de Todas las Formas de Discriminación Racial, art. 2,5 y 7; Carta Africana de Derechos Humanos y de los Pueblos, art. 2 y 3; Convención Americana, art. 1, 8.2 y 24; Convenio para la Protección de los Derechos Humanos y de las Libertades Fundamentales, art. 14.

procedimiento, difícilmente se podría decir que quienes se encuentran en condiciones de desventaja disfrutan de un verdadero acceso a la justicia y se benefician de un debido proceso legal en condiciones de igualdad con quienes no afrontan esas desventajas. Por ello se provee de traductor a quien desconoce el idioma en que se desarrolla el procedimiento, y también por eso mismo se le atribuye al extranjero el derecho a ser informado oportunamente de que puede contar con la asistencia consular. Estos son medios para que los inculpados puedan hacer pleno uso de otros derechos que la ley reconoce a todas las personas. Aquéllos y éstos, indisolublemente vinculados entre sí, forman el conjunto de las garantías procesales y concurren a integrar el debido proceso legal. En el caso al que se refiere la presente Opinión Consultiva, la Corte insistió que se debe tomar en cuenta la situación real que guardan los extranjeros que se ven sujetos a un procedimiento penal, del que dependen sus bienes jurídicos más valiosos y, eventualmente, su vida misma. Es evidente que, en tales circunstancias, la notificación del derecho a comunicarse con el representante consular de su país, contribuirá a mejorar considerablemente sus posibilidades de defensa y a que los actos procesales en los que interviene - y entre ellos los correspondientes a diligencias de policía - se realicen con mayor apego a la ley y respeto a la dignidad de las personas. En tal virtud, la Corte estimó que el derecho individual que se analiza en esta Opinión Consultiva debe ser reconocido y considerado en el marco de las garantías mínimas para brindar a los extranjeros la oportunidad de preparar adecuadamente su defensa y contar con un juicio justo. En otros términos, el derecho individual de información establecido en el artículo 36.1.b) de la Convención de Viena sobre Relaciones Consulares permite que adquiera eficacia, en los casos concretos, el derecho al debido proceso legal consagrado en el artículo 14 del Pacto Internacional de Derechos Civiles y Políticos; y que este precepto establece garantías mínimas susceptibles de expansión a la luz de otros instrumentos internacionales como la Convención de Viena sobre Relaciones Consulares, que amplían el horizonte de la protección de los justiciables.

115. Si la Corte interamericana estuvo dispuesta a considerar que los derechos consulares pueden ser vistos en el marco de los derechos humanos, es también cierto que no se aceptó el reconocerles como derecho humano *per se*. Se puede concluir que los derechos consulares son medios de aplicación del derecho al debido proceso

legal, que es sin duda un derecho fundamental del Hombre. La misma posición fue de cierta manera defendida por los Estados Unidos en el asunto de los *Rehenes en Teherán*, en sus argumentos orales ante la Corte Internacional de Justicia, en donde señalaron que los nacionales norteamericanos habían sido detenidos e incomunicados "en violación de las más flagrantes de las normas consulares y de los estándares aceptados de derechos humanos", enfatizando así el vinculo entre los derechos consulares y los derechos humanos.

116. No obstante la respuesta de la Corte Interamericana, y el rechazo de la Corte Internacional de contestar al mismo argumento presentado por Alemania[211], México intentó presentar el argumento de nuevo en su acción ante la Corte mundial. Y, una vez más los jueces decidieron no establecer que los derechos consulares son derechos humanos. Sin embargo, esta vez la Corte agregó un *obiter dictum* que precisa el motivo: tal cual ni la Convención de Viena ni los *travaux préparatoires* del tratado indican que tal argumento puede ser sostenido[212].

117. Tal fue también la posición del juez disidente Jackson en el Aviso # 18 de la Corte Interamericana de Derechos Humanos, declarando que no hay duda de que el respeto de los derechos consulares tiene su importancia, pero que consiguientemente no es posible que tales derechos pueden ser elevados a "garantías fundamentales universalmente exigible y *conditio sine qua non* para cumplir con los

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[211] [126.] Given the foregoing ruling by the Court regarding the obligation of the United States under certain circumstances to review and reconsider convictions and sentences, the Court need not examine Germany's further argument which seeks to found a like obligation on the contention that the right of a detained person to be informed without delay pursuant to Article 36, paragraph 1, of the Vienna Convention is not only an individual right but has today assumed the character of a human right.

[212] [124.] México has further contended that the right to consular notification and consular communication under the Vienna Convention is a fundamental human right that constitutes part of due process in criminal proceedings and should be guaranteed in the territory of each of the Contracting Parties to the Vienna Convention; according to México, this right, as such, is so fundamental that its infringement will ipso facto produce the effect of vitiating the entire process of the criminal proceedings conducted in violation of this fundamental right. Whether or not the Vienna Convention rights are human rights is not a matter that this Court need decide. The Court would, however, observe that neither the text nor the object and purpose of the Convention, nor any indication in the travaux préparatoires, support the conclusion that México draws from its contention in that regard.

estándares internacionalmente aceptados del debido proceso". Y su posición tiene lógica. Si se considera que informar un extranjero de sus derechos consulares es un incumplimiento del artículo14 del Pacto Internacional de Derechos Civiles y Políticos, eso tendría por consecuencia, que tal violación existiría *ab initio* para cualquier país parte al Pacto pero no a la Convención de Viena. Sin embargo, nunca nadie ha sostenido hasta la fecha que tal obligación existe. Y de cierta manera el Juez Cançado Trindade, en su opinión concurrente en el aviso #18 de la Corte Interamericana de Derechos Humanos lo reconoce, porque insiste en sostener que la naturaleza de la Convención de Viena hubiera cambiado en el tiempo, y que solamente su toma en consideración como "instrumento vivo" en el sentido del precedente *Tyrer*[213] permite una interpretación " a la luz de las condiciones de la vida actual[214]" permite revelar el carácter de derecho humano de los derechos consulares. Eso implica al menos la constancia que al origen así no fue. Pero además, el principio de interpretación invocado es falso. Si tal método interpretacional fue adoptado por la Corte Europea de Derechos Humanos, es *inter alia* en el marco de la Convención Europea de Derechos Humanos. La Corte europea, por su poder otorgado por la Convención, es libre de imponer los principios de interpretación que ella desee adoptar. La mismo vale para la Corte Interamericana de Derechos Humanos con respecto al marco convencional de los derechos humanos de la OEA. Sin embargo, el mencionado principio no puede intervenir al sujeto de un tratado como la Convención de Viena sobre Derechos Consulares que no establece la autoridad de la Corte de San Andres de interpretarla - al contrario, es a la Corte Internacional de Justicia que incumbe tal papel en virtud del Protocolo a la Convención de Viena -, al menos de comprobar que tal principio de interpretación es parte del derecho internacional general. Sin embargo, ni los artículos 31 y 32 de la Convención de Viena sobre el Derecho de los Tratados, ni la jurisprudencia de la Corte Internacional de Justicia, ni la doctrina permite indicar que tal método de interpretación es consagrado fuera de los casos particulares que hemos citados. Al contrario, como lo subrayan los profesores Daillier y Pellet, se observa una tendencia creciente a utilizar los *travaux préparatoires*

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[213] CEDH, Tyrer vs United Kingdom, 1978.

[214] *Idem*, "sin tomar en consideración cual fue la intención de los redactores hace 40 años" (CEDH, *Loizidou vs Turkey*, objeciones preliminares, 1995).

para interpretar los tratados[215], al ejemplo de los casos *Nicaragua c. Estados Unidos*[216] y *Tierras de fosfato*[217], aunque es también verdad que en el caso *Gabcikovo*[218], la Corte internacional utilizó la interpretación evolutiva para adoptar el texto convencional a los datos contemporáneos; sin embargo, es importante mencionar la declaración del Juez y ex presidente Bedjaoui de indicar que se debe considerar que *Gabcikovo* fue un *cas d'espèce* y que la regla general según cual se toma en consideración la fecha de conclusión del instrumento internacional para la interpretación del instrumento no queda cambiada.

118. Sin embargo, aunque se niega reconocer el carácter de derecho humano a los derechos consulares, no se puede olvidar que el derecho internacional general exige que el Estado receptor garantice a los nacionales de otros Estados la igualdad ante la ley[219] y los tribunales, y el *due process*[220]. En este sentido, es difícil aceptar la posición de los *Lords* del *Judicial Committee of the Privy Council*[221] que niega considerar el *due process* para acordar un recurso extraordinario contra una sentencia de pena de muerte no obstante los vicios de procedimiento múltiples y graves, al motivo que se debe salvaguardar el "interés público" consistiendo en que se ejecute una sentencia legal de un tribunal, y que la consagración de tal recurso post-juicio sería "inapropiado y desproporcionado" (¡*sic*!).

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[215] *Op.cit*., # 169.

[216] CIJ, meritos, Activités militaires et paramilitaires au Nicaruaga et contre celui-ci, 27/61986.

[217] Pre-mencionado, nota 34.

[218] Pre-mencionado, nota 35.

[219] Sin embargo, la "igualdad"ante la ley tiene que ser analizada *in concreto* y no *in abstracto*: así al motivo que Irak prohibió tanto a sus nacionales como a los extranjeros de dejar el país durante la crisis de Kuwait, escondió en realidad una toma de rehenes, condenada por el Consejo de Seguridad de las Naciones Unidas (resoluciones 664 y 674 (1990).

[220] Ipsen, *Voelkerrecht*, 4°ed, Munich, Beck, 1999. 706.6; Graf Vitzthum, *Voelkerrecht*, Berlin, WdeG, 1997. 255.258; CPA, *Chevreau*, 9/6/1931, *RSA*, t. II, p. 1113; véase también CIJ, *Barcelona Traction* (Bélgica vs España), 5/7/1970.

[221] Thomas & Hilaire vs Procurador de Trinidad y Tobago, 17/3/1999**.**

119. En realidad, el debate sobre si los derechos consulares son o no derechos humanos no tiene relevancia en si mismo. La calificación de derecho humano no cambia nada en relación con los procedimientos internacionales, en particular en las controversias presentadas ante la Corte internacional, al menos que se considere que los derechos humanos son parte del *jus cogens*[222]; idea que hasta en la fecha nunca fue sostenida tal cual en los fallos internacionales, no obstante que una cierta doctrina defiende tal punto de vista. Según Malcolm Shaw, los derechos humanos convencionales a las cuales un Estado no puede derogar en ninguna circunstancia son según la definición de la Convención de Viena sobre el Derecho de los Tratados parte del *jus cogens*[223]. Sin embargo, tal calificación no tiene consecuencia para las víctimas de la violación de una obligación internacional, salvo lo que hemos mencionado en relación con la protección diplomática[224].

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[222] *Cf* Reuter, *Droit international public*, 6˚ ed., Paris, Themis, 1993.56.

[223] *Op.cit.*.

[224] *Supra* # 94.

Conclusión

120. Es cierto que la problemática de la aplicación de la Convención de Viena se inscribe en el contexto más general de las violaciones cuotidianas y masivas del derecho internacional y obliga al internacionalista poner en duda la existencia misma del *jus gentium*; como lo dicen la mayoría de los académicos americanos, si no hay eficiencia no hay derecho[225]. Sin embargo, tal punto de vista es dogmático y no corresponde al derecho positivo y a la práctica judicial. Tomamos un ejemplo sencillo: cada día se cometen homicidios; ¿quiere decir que la ley que prohíbe el homicidio es inexistente? ¡No! El hecho de constar una violación implica lógicamente la existencia de una regla jurídica a "violar". En otros términos, como lo dice el profesor Martin, la mejor prueba de la existencia del derecho internacional es paradójicamente el hecho de que sus normas son violadas[226]. Así, con respecto a la Convención de Viena por ejemplo, en ningún momento los Estados Unidos han clamado la inexistencia de la norma internacional; al contrario, han buscado justificar el no cumplimiento de sus obligaciones internacionales. Ahora bien, uno se puede lamentar que estas violaciones se queden sin sanción, especialmente cuando el derecho interno se rehúsa a tomar en consideración las reglas internacionales. Sin embargo, tal observación no tiene justificación y la práctica demuestra que los países toman muy en serio cualquier alegación sobre una violación de las obligaciones internacionales[227]. Y si hasta la fecha, los litigios alrededor de los derechos consulares pueden parecer sin éxito, es olvidado que por su propia naturaleza el derecho es lento en cambiar. Sin embargo, antes de 1998, no había un verdadero debate sobre la Convención de Viena; seis años después, los Estados Unidos han sido condenados dos veces ante la Corte Internacional de Justicia, y fueron objeto de varias críticas de la Corte

[225] Kennedy, Les clichés revisités, le droit international et la politique, *Droit international 4*, Paris, IHEI-Pédone, 2000, p. 14 y 15.

[226] Les échecs du droit international, Paris, PUF, 1996, p. 120.

Interamericana de Derechos Humanos. Y cada acción ante la Corte internacional trajo su piedra al edificio:

- Cuando en 1997, dos mexicanos fueron ejecutados en violación de sus derechos consulares, los Estados Unidos presentaron solamente "excusas" al gobierno mexicano;

- después de la orden de la Corte internacional en el caso *Breard*, la Secretaria de Estado Madeleine Albright mandó directamente un oficio al Gobernador de Virginia suplicando suspender la ejecución con el fin de proteger "los intereses de los americanos fuera del territorio".

- En septiembre de 1999, California adoptó la revisión del Código penal implementando los derechos consulares en su legislación local;

- en 2001, la Corte de Apelación Criminal de Oklahoma aceptó de suspender de manera indefinida la suspensión de la ejecución de Valdez considerando el fallo *Lagrand* de la Corte internacional; es cierto que no obstante, el Gobernador Keating rechazó la conmutación de la pena de muerte, argumentando:

> *Officials of the United States State Department have acknowledged that the failure of Mr. Valdez to speak with the consulate violated the Vienna Convention, and they have asked that I take it into consideration when determining whether to grant clemency. Nevertheless, State Department officials concur that the violation should not be the sole determining factor here. I am considering the possible impact of that violation and weighing it against the brutality of Mr. Valdez's admitted crime. [My] staff and I have consulted throughout this process with the United States Department of State and the United States Department of Justice about the legal aspects of the consular notification issue. 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, as well as the information provided by, among others, representatives of your government. [The] failure to comply with Article 36 did not have a prejudicial effect on either the final determination of guilt or the sentence imposed in this case. No compelling reason exists to undermine the confidence and integrity of the jury and the courts in this case*.

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[227] Guy de Lacharrière, *La politique juridique extérieur*e, Paris, Economica, 1983.

Sin embargo, la Corte de Apelación Criminal infirmó la pena de muerte. Cierto, los argumentos fueron basados sobre el derecho estadounidense, pero no hay duda de que la decisión internacional "ayudó" a convencer los magistrados.

- En noviembre 2002, por primera vez un juez federal decidió – en el caso *Madej* - tomar en consideración la decisión *LaGrand*;

- en abril 2004, inmediatamente después la decisión *Avena*, el Procurador General de California declaró que es necesario tomar en consideración el fallo internacional, aunque sin precisar de cuál manera. Texas y Oklahoma declaran no querer seguir la mencionada decisión;

- el 13 de abril de 2004, el Presidente Bush llama al Presidente Fox, asegurando que tomará todas las acciones necesarias para respetar la decisión de la Corte internacional.

- el 13 de mayo de 2004, el Gobernador de Oklahoma conmuta la pena de muerte de Osvaldo Torres en una pena de perpetuidad sin posibilidad de libertad condicional.

- en diciembre de 2004 la Suprema Corte de los Estados Unidos otorga el *writ for certiorari* para oír el caso *Medellin vs Dretke*.

- el 28 de febrero de 2005 el Presidente G. Bush gira oficio al Abogado general de los Estados Unidos para ordenar que la decisión "Avena" de la Corte internacional sea respectada en los 51 casos que fueron objeto del procedimiento internacional.

- el mismo día el Departamento de Justicia norteamericano presenta ante la Corte Suprema un *amicus curiae* en el caso Medellín para llamar la atención sobre la decisión del Presidente estadounidense de hacer respectar la sentencia de la Corte internacional.

- en mayo 2005, una Suprema Corte muy dividido rechaza el recurso de Medellín por razones procesales confusas.

- Pero en septiembre 2005, el séptimo Circuito reitera que el derecho a la notificación según la Convención de Viena es un

derecho individual autoaplicable y su violación da derecho a indemnización.

- En junio 2006, el fallo *Sanchez-Llamas* rendido por la Suprema Corte americana decide que no hay lugar a suprimir pruebas obtenidas en violación del mencionado artículo 36.

- En septiembre 2006, la Corte constitucional alemana estableció que la violación de la Convención de Viena constituye una violación de la "Regla de Derecho" que está consagrada por la Magna Carta alemana y que consecuentemente se debe ordenar la revisión del proceso penal del acusado cuyo derecho consular fue violado.

121. Como se puede constar, la progresión es lenta, pero segura; segura porque es del interés propio de los Estados Unidos de cumplir con el fallo *Avena*. Como lo escribe el profesor Cassel:

> *The cost of compliance is not high. The new ruling adds a procedural requirement – judicial review and reconsideration – that can easily be merged with the extensive appellate and habeas corpus reviews that already take place in all U.S. death penalty and other serious criminal cases. Such review will not likely overturn many prior convictions, and, in the few cases where it might do so, justice will be served.*
>
> *[By] setting this example, the U.S. will protect not only foreign citizens within its borders, but also its own citizens who travel abroad. Mexicans are not the only people who sometimes encounter problems in foreign legal systems. Americans should celebrate, not lament, the ICJ's vindication of the right to judicial review of violations of consular rights*[228],

[228] *Op.cit.*, p. 21.

Para parafrasear Abraham Sofaer, dirigiéndose al Comité de las Relaciones internacionales del Senado americano[229], en un mundo lleno de desorden y terror, la regla de derecho, y de manera implícita, el derecho internacional, en final de cuenta es la única salvación. En este sentido, es más que deplorable que el 7 de marzo de 2005, el Departamento de Estado de los Estados Unidos de América ha notificado al Secretario General de las Naciones Unidas el retiro de los Estados Unidos del Protocolo opcional de la Convención de Viena sobre la jurisdicción obligatoria de la Corte Internacional de Justicia, con la justificación que los Estados Unidos no pueden aceptar el hecho que la Corte internacional actúe como “corte de apelación” de las decisiones judiciales americanas; eso no obstante que la Corte mundial siempre hizo muy claro ¡que no actúe como “Corte de apelación”[230]!

Ahora bien, se queda un último punto a resolver: contestar la pregunta legítima del ¿cómo va a terminar el asunto de Avena ante los tribunales americanos? No es posible dar una respuesta univoca. Lo que es cierto es que los americanos tienen conciencia de la dicotomía hegeliana, que es que cada nación tiene una doble vida: la interna, nacionalista, individualista; una externa, internacionalista, universalista. ¿Cuál aspecto tiene que absorber el otro? Nos parece que la respuesta es fácil: la que se imponga en función del derecho, porque al final de cuentas como lo exclamó de manera tan admirable Mirabeau ante la Asamblea constituyente de la primera República francesa: ¡El Derecho es el Soberano del Mundo!

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[229] Citado por Henkin & *alii*, *International Law*, 3d ed., Minnesota, West Publishing, 1993.849,850.

[230] Supra # 32.

ANEXO

INTERNATIONAL COURT OF JUSTICE
YEAR 2004

2004
31 March
General List
No. 128

31 March 2004
CASE CONCERNING AVENA AND OTHER MEXICAN NATIONALS
(MEXICO v. UNITED STATES OF AMERICA)
Facts of the case • Article 36 of the Vienna Convention on Consular Relations of
24 April 1963.

* *

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

* *

Jurisdiction of the Court.

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

Second United States objection to jurisdiction - Contention that the first submission of Mexico's Memorial is excluded from the Court's jurisdiction - Mexico defending an interpretation of the Vienna Convention whereby not only the absence of consular notification but also the arrest, detention, trial and

conviction of its nationals were unlawful, failing such notification - Interpretation of Vienna Convention a matter within the Court's jurisdiction.

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

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

* *

Admissibility of Mexico's claims.

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

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

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

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

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

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

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

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

Article 36, paragraph 1 (a) and (c) • Interrelated nature of the three subparagraphs of paragraph 1 • Violation by United States of the obligation to enable Mexican consular officers to communicate with, have access to and visit their nationals in 49 cases • Violation by United States of the obligation to enable Mexican consular officers to arrange for legal representation of their nationals in 34 cases.

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

* *

Legal consequences of the breach.

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

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

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

* *

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

* *

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

JUDGMENT

Present: President SHI; Vice-President RANJEVA; Judges GUILLAUME, KOROMA, VERESHCHETIN, HIGGINS, PARRA-ARANGUREN, KOOIJMANS, REZEK, AL-KHASAWNEH, BUERGENTHAL, ELARABY, OWADA, TOMKA;

Judge ad hoc SEPÚLVEDA; Registrar COUVREUR.

In the case concerning Avena and other Mexican nationals,

Between the United Mexican States, and the United States of America,

THE COURT,

composed as above,

after deliberation,

delivers the following Judgment:

James A. Graham

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

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

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

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

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

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

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

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

In a letter of 2 November 2003, the Agent of the United States advised the Court that the United States had "informed the relevant state authorities of Mexico's application"; that, since the Order of 5 February 2003, the United States had "obtained from them information about the status of the fifty-four cases, including the three cases identified in paragraph 59 (I) (a) of that Order";

and that the United States could “confirm that none of the named individuals [had] been executed”.

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

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

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

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

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

In a letter of 2 November 2003, under cover of which the United States filed its Counter-Memorial within the time-limit prescribed, the Agent of the United States informed the Court that his Government objected to the amendment of Mexico’s submissions, on the grounds that the request was late,

that Mexico had submitted no evidence concerning the alleged facts and that there was not enough time for the United States to investigate them.

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

On 9 December 2003, the Registrar informed Mexico and the United States that, in order to ensure the procedural equality of the Parties, the Court had decided not to authorize the amendment of Mexico's submissions so as to include the two additional Mexican nationals mentioned above.

He also informed the Parties that the Court had taken note that the United States had made no objection to the withdrawal by Mexico of its request for relief in the cases of Mr. Zambrano and Mr. Hernández.

8. On 28 November 2003 and 2 December 2003, Mexico filed various documents which it wished to produce in accordance with Article 56 of the Rules of Court. By letters dated 2 December 2003 and 5 December 2003, the Agent of the United States informed the Court that his Government did not object to the production of these new documents and that it intended to exercise its right to comment upon these documents and to submit documents in support of its comments, pursuant to paragraph 3 of that Article. By letters dated 9 December 2003, the Registrar informed the Parties that the Court had taken note that the United States had no objection to the production of these documents and that accordingly counsel would be free to refer to them in the course of the hearings. On 10 December 2003, the Agent of the United States filed the comments of his Government on the new documents produced by Mexico, together with a number of documents in support of those comments.

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

10. Pursuant to Article 53, paragraph 2, of its Rules, the Court, having consulted the Parties, decided that copies of the pleadings and documents

annexed would be made accessible to the public on the opening of the oral proceedings.

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

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

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

*

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

"The Government of the United Mexican States therefore asks the Court to adjudge and declare:

(1) that the United States, in arresting, detaining, trying, convicting, and sentencing the 54 Mexican nationals on death row described in this Application, violated its international legal obligations to Mexico, in its own right and in the exercise of its right of consular protection of its nationals, as provided by Articles 5 and 36, respectively of the Vienna Convention;

(2) that Mexico is therefore entitled to restitutio in integrum;

(3) that the United States is under an international legal obligation not to apply the doctrine of procedural default, or any other doctrine of its municipal

law, to preclude the exercise of the rights afforded by Article 36 of the Vienna Convention;

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

(5) that the right to consular notification under the Vienna Convention is a human right; and that, pursuant to the foregoing international legal obligations,

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

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

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

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

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

On behalf of the Government of Mexico,

in the Memorial:

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

(1) that the United States, in arresting, detaining, trying, convicting, and sentencing the fifty-four Mexican nationals on death row described in Mexico's Application and this Memorial, violated its international legal obligations to Mexico, in its own right and in the exercise of its right of diplomatic protection of its nationals, as provided by Article 36 of the Vienna Convention;

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

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

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

and that, pursuant to the foregoing international legal obligations,

(1) Mexico is entitled to restitutio in integrum and the United States therefore is under an obligation to restore the status quo ante, that is, 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."

On behalf of the Government of the United States,

in the Counter-Memorial:

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

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

On behalf of the Government of Mexico,

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

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

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

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

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

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

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

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

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

On behalf of the Government of the United States,

“On the basis of the facts and arguments made by the United States in its Counter-Memorial and in these proceedings, the Government of the United States of America requests that the Court, taking into account that the United States has conformed its conduct to this Court’s Judgment in the LaGrand Case (Germany v. United States of America), not only with respect to German nationals but, consistent with the Declaration of the President of the Court in

that case, to all detained foreign nationals, adjudge and declare that the claims of the United Mexican States are dismissed."

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

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

1. Carlos Avena Guillen
2. Héctor Juan Ayala
3. Vicente Benavides Figueroa
4. Constantino Carrera Montenegro
5. Jorge Contreras López
6. Daniel Covarrubias Sánchez
7. Marcos Esquivel Barrera
8. Rubén Gómez Pérez
9. Jaime Armando Hoyos
10. Arturo Juárez Suárez
11. Juan Manuel López
12. José Lupercio Casares
13. Luis Alberto Maciel Hernández
14. Abelino Manríquez Jáquez
15. Omar Fuentes Martínez (a.k.a. Luis Aviles de la Cruz)
16. Miguel Angel Martínez Sánchez
17. Martín Mendoza García

18. Sergio Ochoa Tamayo
19. Enrique Parra Dueñas
20. Juan de Dios Ramírez Villa
21. Magdaleno Salazar
22. Ramón Salcido Bojórquez
23. Juan Ramón Sánchez Ramírez
24. Ignacio Tafoya Arriola
25. Alfredo Valdez Reyes
26. Eduardo David Vargas
27. Tomás Verano Cruz
28. [Case withdrawn]
29. Samuel Zamudio Jiménez
30. Juan Carlos Alvarez Banda
31. César Roberto Fierro Reyna
32. Héctor García Torres
33. Ignacio Gómez
34. Ramiro Hernández Llanas
35. Ramiro Rubí Ibarra
36. Humberto Leal García
37. Virgilio Maldonado
38. José Ernesto Medellín Rojas
39. Roberto Moreno Ramos
40. Daniel Angel Plata Estrada
41. Rubén Ramírez Cárdenas
42. Félix Rocha Díaz
43. Oswaldo Regalado Soriano
44. Edgar Arias Tamayo
45. Juan Caballero Hernández
46. Mario Flores Urbán
47. Gabriel Solache Romero
48. Martín Raúl Fong Soto
49. Rafael Camargo Ojeda
50. [Case withdrawn]
51. Carlos René Pérez Gutiérrez
52. José Trinidad Loza
53. Osvaldo Netzahualcóyotl Torres Aguilera
54. Horacio Alberto Reyes Camarena

17. The provisions of the Vienna Convention of which Mexico alleges violations are contained in Article 36. Paragraphs 1 and 2 of this Article are set out respectively in paragraphs 50 and 108 below. Article 36 relates, according to its title, to "Communication and contact with nationals of the sending State".

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

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

19. The underlying facts alleged by Mexico may be briefly described as follows: some are conceded by the United States, and some disputed. Mexico states that all the individuals the subject of its claims were Mexican nationals at the time of their arrest. It further contends that the United States authorities that arrested and interrogated these individuals had sufficient information at their disposal to be aware of the foreign nationality of those individuals. According to Mexico's account, in 50 of the specified cases, Mexican nationals were never informed by the competent United States authorities of their rights under Article 36, paragraph 1 (b), of the Vienna Convention and, in the two remaining cases, such information was not provided "without delay", as required by that provision. Mexico has indicated that in 29 of the 52 cases its consular authorities learned of the detention of the Mexican nationals only after death sentences had been handed down. In the 23 remaining cases, Mexico contends that it learned of the cases through means other than notification to the consular post by the competent United States authorities under Article 36, paragraph 1 (b). It explains that in five cases this was too late to affect the trials, that in 15 cases the defendants had already made incriminating statements, and that it became aware of the other three cases only after considerable delay.

20. Of the 52 cases referred to in Mexico's final submissions, 49 are currently at different stages of the proceedings before United States judicial

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

21. On 9 January 2003, the day on which Mexico filed its Application and a request for the indication of provisional measures, all 52 individuals the subject of the claims were on death row. However, two days later the Governor of the State of Illinois, exercising his power of clemency review, commuted the sentences of all convicted individuals awaiting execution in that State, including those of three individuals named in Mexico's Application (Mr. Caballero (case No. 45), Mr. Flores (case No. 46) and Mr. Solache (case No. 47)). By a letter dated 20 January 2003, Mexico informed the Court that, further to that decision, it withdrew its request for the indication of provisional measures on behalf of these three individuals, but that its Application remained unchanged. In the Order of 5 February 2003, mentioned in paragraph 3 above, on the request by Mexico for the indication of provisional measures, the Court considered that it was apparent from the information before it that the three Mexican nationals named in the Application who had exhausted all judicial remedies in the United States (see paragraph 20 above) were at risk of execution in the following months, or even weeks. Consequently, it ordered by way of provisional measure that the United States take all measures necessary to ensure that these individuals would not be executed pending final judgment in these proceedings. The Court notes that, at the date of the present Judgment, these three individuals have not been executed, but further notes with great concern that, by an Order dated 1 March 2004, the Oklahoma Court of Criminal Appeals has set an execution date of 18 May 2004 for Mr. Torres.

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The Mexican objection to the United States objections to jurisdiction and admissibility

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

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

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

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

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

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

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

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

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

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United States objections to jurisdiction

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

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

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

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29. The second jurisdictional objection presented by the United States was addressed to the first of the submissions presented by Mexico in its Memorial (see paragraph 13 above). The United States pointed out that Article 36 of the Vienna Convention "creates no obligations constraining the rights of the United States to arrest a foreign national"; and that similarly the "detaining, trying, convicting and sentencing" of Mexican nationals could not constitute breaches of Article 36, which merely lays down obligations of notification. The United States deduced from this that the matters raised in Mexico's first submission are outside the jurisdiction of the Court under the Vienna Convention and the Optional Protocol, and it maintains this objection in response to the revised submission, presented by Mexico at the hearings, whereby it asks the Court to adjudge and declare:

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

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

"Consular notification constitutes a basic component of due process by ensuring both the procedural equality of a foreign national in the criminal process and the enforcement of other fundamental due process guarantees to which that national is entitled", and that "It is therefore an essential requirement for fair criminal proceedings against foreign nationals." In Mexico's contention,

"consular notification has been widely recognized as a fundamental due process right, and indeed, a human right". On this basis it argues that the rights of the detained Mexican nationals have been violated by the authorities of the United States, and that those nationals have been "subjected to criminal proceedings without the fairness and dignity to which each person is entitled". Consequently, in the contention of Mexico, "the integrity of these proceedings has been hopelessly undermined, their outcomes rendered irrevocably unjust". For Mexico to contend, on this basis, that not merely the failure to notify, but the arrest, detention, trial and conviction of its nationals were unlawful is to argue in favour of a particular interpretation of the Vienna Convention. Such an interpretation may or may not be confirmed on the merits, but is not excluded from the jurisdiction conferred on the Court by the Optional Protocol to the Vienna Convention. The second objection of the United States to jurisdiction cannot therefore be upheld.

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31. The third objection by the United States to the jurisdiction of the Court refers to the first of the submissions in the Mexican Memorial concerning remedies. By that submission, which was confirmed in substance in the final submissions, Mexico claimed that

"Mexico is entitled to restitutio in integrum, and the United States therefore is under an obligation to restore the status quo ante, that is, 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 . . ."

On that basis, Mexico went on in its first submission to invite the Court to declare that the United States was bound to vacate the convictions and sentences of the Mexican nationals concerned, to exclude from any subsequent proceedings any statements and confessions obtained from them, to prevent the application of any procedural penalty for failure to raise a timely defence on the basis of the Convention, and to prevent the application of any municipal law rule preventing courts in the United States from providing a remedy for the violation of Article 36 rights.

32. The United States objects that so to require specific acts by the United States in its municipal criminal justice systems would intrude deeply into the independence of its courts; and that for the Court to declare that the United States is under a specific obligation to vacate convictions and sentences would

be beyond its jurisdiction. The Court, the United States claims, has no jurisdiction to review appropriateness of sentences in criminal cases, and even less to determine guilt or innocence, matters which only a court of criminal appeal could go into.

33. For its part, Mexico points out that the United States accepts that the Court has jurisdiction to interpret the Vienna Convention and to determine the appropriate form of reparation under international law. In Mexico's view, these two considerations are sufficient to defeat the third objection to jurisdiction of the United States.

34. For the same reason as in respect of the second jurisdictional objection, the Court is unable to uphold the contention of the United States that, even if the Court were to find that breaches of the Vienna Convention have been committed by the United States of the kind alleged by Mexico, it would still be without jurisdiction to order restitutio in integrum as requested by Mexico. The Court would recall in this regard, as it did in the LaGrand case, that, where jurisdiction exists over a dispute on a particular matter, no separate basis for jurisdiction is required by the Court in order to consider the remedies a party has requested for the breach of the obligation (I.C.J. Reports 2001, p. 485, para. 48). Whether or how far the Court may order the remedy requested by Mexico are matters to be determined as part of the merits of the dispute. The third objection of the United States to jurisdiction cannot therefore be upheld.

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35. The fourth and last jurisdictional objection of the United States is that "the Court lacks jurisdiction to determine whether or not consular notification is a 'human right', or to declare fundamental requirements of substantive or procedural due process". As noted above, it is on the basis of Mexico's contention that the right to consular notification has been widely recognized as a fundamental due process right, and indeed a human right, that it argues that the rights of the detained Mexican nationals have been violated by the authorities of the United States, and that they have been "subjected to criminal proceedings without the fairness and dignity to which each person is entitled". The Court observes that Mexico has presented this argument as being a matter of interpretation of Article 36, paragraph 1 (b), and therefore belonging to the merits. The Court considers that this is indeed a question of interpretation of the Vienna Convention, for which it has jurisdiction; the fourth objection of the United States to jurisdiction cannot therefore be upheld.

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United States objections to admissibility

36. In its Counter-Memorial, the United States has advanced a number of arguments presented as objections to the admissibility of Mexico's claims. It argues that

"Before proceeding, the Court should weigh whether characteristics of the case before it today, or special circumstances related to particular claims, render either the entire case, or particular claims, inappropriate for further consideration and decision by the Court."

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37. The first objection under this head is that "Mexico's submissions should be found inadmissible because they seek to have this Court function as a court of criminal appeal"; there is, in the view of the United States, "no other apt characterization of Mexico's two submissions in respect of remedies". The Court notes that this contention is addressed solely to the question of remedies. The United States does not contend on this ground that the Court should decline jurisdiction to enquire into the question of breaches of the Vienna Convention at all, but simply that, if such breaches are shown, the Court should do no more than decide that the United States must provide "review and reconsideration" along the lines indicated in the Judgment in the LaGrand case (I.C.J. Reports 2001, pp. 513-514, para. 125). The Court notes that this is a matter of merits. The first objection of the United States to admissibility cannot therefore be upheld.

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38. The Court now turns to the objection of the United States based on the rule of exhaustion of local remedies. The United States contends that the Court "should find inadmissible Mexico's claim to exercise its right of diplomatic protection on behalf of any Mexican national who has failed to meet the customary legal requirement of exhaustion of municipal remedies". It asserts that in a number of the cases the subject of Mexico's claims, the detained Mexican national, even with the benefit of the provision of Mexican consular assistance, failed to raise the alleged non-compliance with Article 36, paragraph 1, of the Vienna Convention at the trial. Furthermore, it contends that all of the claims relating to cases referred to in the Mexican Memorial are inadmissible because local remedies remain available in every case. It has drawn attention to

the fact that litigation is pending before courts in the United States in a large number of the cases the subject of Mexico's claims and that, in those cases where judicial remedies have been exhausted, the defendants have not had recourse to the clemency process available to them; from this it concludes that none of the cases "is in an appropriate posture for review by an international tribunal".

39. Mexico responds that the rule of exhaustion of local remedies cannot preclude the admissibility of its claims. It first states that a majority of the Mexican nationals referred to in paragraph 16 above have sought judicial remedies in the United States based on the Vienna Convention and that their claims have been barred, notably on the basis of the procedural default doctrine. In this regard, it quotes the Court's statement in the LaGrand case that "the United States may not . . . rely before this Court on this fact in order to preclude the admissibility of Germany's [claim] . . ., as it was the United States itself which had failed to carry out its obligation under the Convention to inform the LaGrand brothers" (I.C.J. Reports 2001, p. 488, para. 60). Further, in respect of the other Mexican nationals, Mexico asserts that

"the courts of the United States have never granted a judicial remedy to any foreign national for a violation of Article 36. The United States courts hold either that Article 36 does not create an individual right, or that a foreign national who has been denied his Article 36 rights but given his constitutional and statutory rights, cannot establish prejudice and therefore cannot get relief."

It concludes that the available judicial remedies are thus ineffective. As for clemency procedures, Mexico contends that they cannot count for purposes of the rule of exhaustion of local remedies, because they are not a judicial remedy.

40. In its final submissions Mexico asks the Court to adjudge and declare that the United States, in failing to comply with Article 36, paragraph 1, of the Vienna Convention, has "violated its international legal obligations to Mexico, in its own right and in the exercise of its right of diplomatic protection of its nationals".

The Court would first observe that the individual rights of Mexican nationals under subparagraph 1 (b) of Article 36 of the Vienna Convention are rights which are to be asserted, at any rate in the first place, within the domestic legal system of the United States. Only when that process is completed and local remedies are exhausted would Mexico be entitled to espouse the individual claims of its nationals through the procedure of diplomatic protection.

In the present case Mexico does not, however, claim to be acting solely on that basis. It also asserts its own claims, basing them on the injury which it contends that it has itself suffered, directly and through its nationals, as a result of the violation by the United States of the obligations incumbent upon it under Article 36, paragraph 1 (a), (b) and (c).

The Court would recall that, in the LaGrand case, it recognized that "Article 36, paragraph 1 [of the Vienna Convention], creates individual rights [for the national concerned], which . . . may be invoked in this Court by the national State of the detained person" (I.C.J. Reports 2001, p. 494, para. 77). It would further observe that violations of the rights of the individual under Article 36 may entail a violation of the rights of the sending State, and that violations of the rights of the latter may entail a violation of the rights of the individual. In these special circumstances of interdependence of the rights of the State and of individual rights, Mexico may, in submitting a claim in its own name, request the Court to rule on the violation of rights which it claims to have suffered both directly and through the violation of individual rights conferred on Mexican nationals under Article 36, paragraph 1 (b). The duty to exhaust local remedies does not apply to such a request. Further, for reasons just explained, the Court does not find it necessary to deal with Mexico's claims of violation under a distinct heading of diplomatic protection. Without needing to pronounce at this juncture on the issues raised by the procedural default rule, as explained by Mexico in paragraph 39 above, the Court accordingly finds that the second objection by the United States to admissibility cannot be upheld.

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41. The Court now turns to the question of the alleged dual nationality of certain of the Mexican nationals the subject of Mexico's claims. This question is raised by the United States by way of an objection to the admissibility of those claims: the United States contends that in its Memorial Mexico had failed to establish that it may exercise diplomatic protection based on breaches of Mexico's rights under the Vienna Convention with respect to those of its nationals who are also nationals of the United States. The United States regards it as an accepted principle that, when a person arrested or detained in the receiving State is a national of that State, then even if he is also a national of another State party to the Vienna Convention, Article 36 has no application, and the authorities of the receiving State are not required to proceed as laid down in that Article; and Mexico has indicated that, for the purposes of the present case

it does not contest that dual nationals have no right to be advised of their rights under Article 36.

42. It has however to be recalled that Mexico, in addition to seeking to exercise diplomatic protection of its nationals, is making a claim in its own right on the basis of the alleged breaches by the United States of Article 36 of the Vienna Convention. Seen from this standpoint, the question of dual nationality is not one of admissibility, but of merits. A claim may be made by Mexico of breach of Article 36 of the Vienna Convention in relation to any of its nationals, and the United States is thereupon free to show that, because the person concerned was also a United States national, Article 36 had no application to that person, so that no breach of treaty obligations could have occurred. Furthermore, as regards the claim to exercise diplomatic protection, the question whether Mexico is entitled to protect a person having dual Mexican and United States nationality is subordinated to the question whether, in relation to such a person, the United States was under any obligation in terms of Article 36 of the Vienna Convention. It is thus in the course of its examination of the merits that the Court will have to consider whether the individuals concerned, or some of them, were dual nationals in law. Without prejudice to the outcome of such examination, the third objection of the United States to admissibility cannot therefore be upheld.

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43. The Court now turns to the fourth objection advanced by the United States to the admissibility of Mexico's claims: the contention that "The Court should not permit Mexico to pursue a claim against the United States with respect to any individual case where Mexico had actual knowledge of a breach of the [Vienna Convention] but failed to bring such breach to the attention of the United States or did so only after considerable delay." In the Counter-Memorial, the United States advances two considerations in support of this contention: that if the cases had been mentioned promptly, corrective action might have been possible; and that by inaction Mexico created an impression that it considered that the United States was meeting its obligations under the Convention, as Mexico understood them. At the hearings, the United States suggested that Mexico had in effect waived its right to claim in respect of the alleged breaches of the Convention, and to seek reparation.

44. As the Court observed in the case of Certain Phosphate Lands in Nauru (Nauru v. Australia), "delay on the part of a claimant State may render an

application inadmissible", but "international law does not lay down any specific time-limit in that regard" (I.C.J. Reports 1992, pp. 253-254, para. 32). In that case the Court recognized that delay might prejudice the respondent State "with regard to both the establishment of the facts and the determination of the content of the applicable law" (ibid., p. 255, para. 36), but it has not been suggested that there is any such risk of prejudice in the present case. So far as inadmissibility might be based on an implied waiver of rights, the Court considers that only a much more prolonged and consistent inaction on the part of Mexico than any that the United States has alleged might be interpreted as implying such a waiver. Furthermore, Mexico indicated a number of ways in which it brought to the attention of the United States the breaches which it perceived of the Vienna Convention. The fourth objection of the United States to admissibility cannot therefore be upheld.

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45. The Court has now to examine the objection of the United States that the claim of Mexico is inadmissible in that Mexico should not be allowed to invoke against the United States standards that Mexico does not follow in its own practice. The United States contends that, in accordance with basic principles of administration of justice and the equality of States, both litigants are to be held accountable to the same rules of international law. The objection in this regard was presented in terms of the interpretation of Article 36 of the Vienna Convention, in the sense that, according to the United States, a treaty may not be interpreted so as to impose a significantly greater burden on any one party than the other (Diversion of Water from the Meuse, Judgment, 1937, P.C.I.J., Series A/B, No. 70, p. 20).

46. The Court would recall that the United States had already raised an objection of a similar nature before it in the LaGrand case; there, the Court held that it need not decide "whether this argument of the United States, if true, would result in the inadmissibility of Germany's submissions", since the United States had failed to prove that Germany's own practice did not conform to the standards it was demanding from the United States (I.C.J. Reports 2001, p. 489, para. 63).

47. The Court would recall that it is in any event essential to have in mind the nature of the Vienna Convention. It lays down certain standards to be observed by all States parties, with a view to the "unimpeded conduct of consular relations", which, as the Court observed in 1979, is important in present-day international law "in promoting the development of friendly relations among nations, and ensuring protection and assistance for aliens

resident in the territories of other States" (United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran), Order of 15 December 1979, I.C.J. Reports 1979, pp. 19-20, para. 40). Even if it were shown, therefore, that Mexico's practice as regards the application of Article 36 was not beyond reproach, this would not constitute a ground of objection to the admissibility of Mexico's claim. The fifth objection of the United States to admissibility cannot therefore be upheld.

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48. Having established that it has jurisdiction to entertain Mexico's claims and that they are admissible, the Court will now turn to the merits of those claims.

* *

Article 36, paragraph 1

49. In its final submissions Mexico asks the Court to adjudge and declare that,

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

50. The Court has already in its Judgment in the LaGrand case described Article 36, paragraph 1, as "an interrelated régime designed to facilitate the implementation of the system of consular protection" (I.C.J. Reports 2001, p. 492, para. 74). It is thus convenient to set out the entirety of that paragraph.

"With a view toward facilitating the exercise of consular functions relating to nationals of the sending State:

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

(b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph;

(c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action."

51. The United States as the receiving State does not deny its duty to perform these obligations. However, it claims that the obligations apply only to individuals shown to be of Mexican nationality alone, and not to those of dual Mexican/United States nationality. The United States further contends inter alia that it has not committed any breach of Article 36, paragraph 1 (b), upon the proper interpretation of "without delay" as used in that subparagraph.

52. Thus two major issues under Article 36, paragraph 1 (b), that are in dispute between the Parties are, first, the question of the nationality of the individuals concerned; and second, the question of the meaning to be given to the expression "without delay". The Court will examine each of these in turn.

53. The Parties have advanced their contentions as to nationality in three different legal contexts. The United States has begun by making an objection to admissibility, which the Court has already dealt with (see paragraphs 41 and 42 above). The United States has further contended that a substantial number of the 52 persons listed in paragraph 16 above were United States nationals and that it

thus had no obligation to these individuals under Article 36, paragraph 1 (b). The Court will address this aspect of the matter in the following paragraphs. Finally, the Parties to whether the requirement under Article 36, paragraph 1 (b), for the information to be given "without delay" becomes operative upon arrest or upon ascertainment of nationality. The Court will address this issue later (see paragraph 63 below).

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

55. Both Parties recognize the well-settled principle in international law that a litigant seeking to establish the existence of a fact bears the burden of proving it (cf. Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984, p. 437, para. 101). Mexico acknowledges that it has the burden of proof to show that the 52 persons listed in paragraph 16 above were Mexican nationals to whom the provisions of Article 36, paragraph 1 (b), in principle apply. It claims it has met this burden by providing to the Court the birth certificates of these nationals, and declarations from 42 of them that they have not acquired U.S. nationality. Mexico further contends that the burden of proof lies on the United States should it wish to contend that particular arrested persons of Mexican nationality were, at the relevant time, also United States nationals.

56. The United States accepts that in such cases it has the burden of proof to demonstrate United States nationality, but contends that nonetheless the "burden of evidence" as to this remains with Mexico. This distinction is explained by the United States as arising out of the fact that persons of Mexican nationality may also have acquired United States citizenship by operation of law, depending on their parents' dates and places of birth, places of residency, marital status at time of their birth and so forth. In the view of the United States "virtually all such information is in the hands of Mexico through the now 52 individuals it represents". The United States contends that it was the responsibility of Mexico to produce such information, which responsibility it has not discharged.

57. The Court finds that it is for Mexico to show that the 52 persons listed in paragraph 16 above held Mexican nationality at the time of their arrest. The Court notes that to this end Mexico has produced birth certificates and

declarations of nationality, whose contents have not been challenged by the United States.

The Court observes further that the United States has, however, questioned whether some of these individuals were not also United States nationals. Thus, the United States has informed the Court that, "in the case of defendant Ayala (case No. 2) we are close to certain that Ayala is a United States citizen", and that this could be confirmed with absolute certainty if Mexico produced facts about this matter. Similarly Mr. Avena (case No. 1) was said to be "likely" to be a United States citizen, and there was "some possibility" that some 16 other defendants were United States citizens. As to six others, the United States said it "cannot rule out the possibility" of United States nationality. The Court takes the view that it was for the United States to demonstrate that this was so and to furnish the Court with all information on the matter in its possession. In so far as relevant data on that matter are said by the United States to lie within the knowledge of Mexico, it was for the United States to have sought that information from the Mexican authorities. The Court cannot accept that, because such information may have been in part in the hands of Mexico, it was for Mexico to produce such information. It was for the United States to seek such information, with sufficient specificity, and to demonstrate both that this was done and that the Mexican authorities declined or failed to respond to such specific requests. At no stage, however, has the United States shown the Court that it made specific enquiries of those authorities about particular cases and that responses were not forthcoming. The Court accordingly concludes that the United States has not met its burden of proof in its attempt to show that persons of Mexican nationality were also United States nationals. The Court therefore finds that, as regards the 52 persons listed in paragraph 16 above, the United States had obligations under Article 36, paragraph 1 (b).

58. Mexico asks the Court to find that

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

59. Mexico contends that, in each of the 52 cases before the Court, the United States failed to provide the arrested persons with information as to their rights under Article 36, paragraph 1 (b), "without delay". It alleges that in one case, Mr. Esquivel (case No. 7), the arrested person was informed, but only some 18 months after the arrest, while in another, that of Mr. Juárez (case No. 10), information was given to the arrested person of his rights some 40 hours

after arrest. Mexico contends that this still constituted a violation, because "without delay" is to be understood as meaning "immediately", and in any event before any interrogation occurs. Mexico further draws the Court's attention to the fact that in this case a United States court found that there had been a violation of Article 36, paragraph 1 (b), and claims that the United States cannot disavow such a determination by its own courts. In an Annex to its Memorial, Mexico mentions that, in a third case (Mr. Ayala, case No. 2), the accused was informed of his rights upon his arrival on death row, some four years after arrest. Mexico contends that in the remaining cases the Mexicans concerned were in fact never so informed by the United States authorities.

60. The United States disputes both the facts as presented by Mexico and the legal analysis of Article 36, paragraph 1 (b), of the Vienna Convention offered by Mexico. The United States claims that Mr. Solache (case No. 47) was informed of his rights under the Vienna Convention some seven months after his arrest. The United States further claims that many of the persons concerned were of United States nationality and that at least seven of these individuals "appear to have affirmatively claimed to be United States citizens at the time of their arrest". These cases were said to be those of Avena (case No. 1), Ayala (case No. 2), Benavides (case No. 3), Ochoa (case No. 18), Salcido (case No. 22), Tafoya (case No. 24), and Alvarez (case No. 30). In the view of the United States no duty of consular information arose in these cases. Further, in the contention of the United States, in the cases of Mr. Ayala (case No. 2) and Mr. Salcido (case No. 22) there was no reason to believe that the arrested persons were Mexican nationals at any stage; the information in the case of Mr. Juárez (case No. 10) was given "without delay".

61. The Court thus now turns to the interpretation of Article 36, paragraph 1 (b), having found in paragraph 57 above that it is applicable to the 52 persons listed in paragraph 16. It begins by noting that Article 36, paragraph 1 (b), contains three separate but interrelated elements: the right of the individual concerned to be informed without delay of his rights under Article 36, paragraph 1 (b); the right of the consular post to be notified without delay of the individual's detention, if he so requests; and the obligation of the receiving State to forward without delay any communication addressed to the consular post by the detained person.

62. The third element of Article 36, paragraph 1 (b), has not been raised on the facts before the Court. The Court thus begins with the right of an arrested or detained individual to information.

63. The Court finds that the duty upon the detaining authorities to give the Article 36, paragraph 1 (b), information to the individual arises once it is realized that the person is a foreign national, or once there are grounds to think that the person is probably a foreign national. Precisely when this may occur will vary with circumstances. The United States Department of State booklet, Consular Notification and Access • Instructions for Federal, State and Local Law Enforcement and Other Officials Regarding Foreign Nationals in the United States and the Rights of Consular Officials to Assist Them, issued to federal, state and local authorities in order to promote compliance with Article 36 of the Vienna Convention points out in such cases that: "most, but not all, persons born outside the United States are not [citizens]. Unfamiliarity with English may also indicate foreign nationality." The Court notes that when an arrested person himself claims to be of United States nationality, the realization by the authorities that he is not in fact a United States national, or grounds for that realization, is likely to come somewhat later in time.

64. The United States has told the Court that millions of aliens reside, either legally or illegally, on its territory, and moreover that its laws concerning citizenship are generous. The United States has also pointed out that it is a multicultural society, with citizenship being held by persons of diverse appearance, speaking many languages. The Court appreciates that in the United States the language that a person speaks, or his appearance, does not necessarily indicate that he is a foreign national. Nevertheless, and particularly in view of the large numbers of foreign nationals living in the United States, these very circumstances suggest that it would be desirable for enquiry routinely to be made of the individual as to his nationality upon his detention, so that the obligations of the Vienna Convention may be complied with. The United States has informed the Court that some of its law enforcement authorities do routinely ask persons taken into detention whether they are United States citizens. Indeed, were each individual to be told at that time that, should he be a foreign national, he is entitled to ask for his consular post to be contacted, compliance with this requirement under Article 36, paragraph 1 (b), would be greatly enhanced.

The provision of such information could parallel the reading of those rights of which any person taken into custody in connection with a criminal offence must be informed prior to interrogation by virtue of what in the United States is known as the "Miranda rule"; these rights include, inter alia, the right to remain silent, the right to have an attorney present during questioning, and the right to have an attorney appointed at government expense if the person cannot afford one. The Court notes that, according to the United States, such a practice in respect of the Vienna Convention rights is already being followed in some local jurisdictions.

65. Bearing in mind the complexities explained by the United States, the Court now begins by examining the application of Article 36, paragraph 1 (b), of the Vienna Convention to the 52 cases. In 45 of these cases, the Court has no evidence that the arrested persons claimed United States nationality, or were reasonably thought to be United States nationals, with specific enquiries being made in timely fashion to verify such dual nationality. The Court has explained in paragraph 57 above what inquiries it would have expected to have been made, within a short time period, and what information should have been provided to the Court.

66. Seven persons, however, are asserted by the United States to have stated at the time of arrest that they were United States citizens. Only in the case of Mr. Salcido (case No. 22) has the Court been provided by the United States with evidence of such a statement. This has been acknowledged by Mexico. Further, there has been no evidence before the Court to suggest that there were in this case at the same time also indications of Mexican nationality, which should have caused rapid enquiry by the arresting authorities and the providing of consular information “without delay”. Mexico has accordingly not shown that in the case of Mr. Salcido the United States violated its obligations under Article 36, paragraph 1 (b).

67. In the case of Mr. Ayala (case No. 2), while he was identified in a court record in 1989 (three years after his arrest) as a United States citizen, there is no evidence to show this Court that the accused did indeed claim upon his arrest to be a United States citizen. The Court has not been informed of any enquiries made by the United States to confirm these assertions of United States nationality.

68. In the five other cases listed by the United States as cases where the individuals “appear to have affirmatively claimed to be United States citizens at the time of their arrest”, no evidence has been presented that such a statement was made at the time of arrest.

69. Mr. Avena (case No. 1) is listed in his arrest report as having been born in California. His prison records describe him as of Mexican nationality. The United States has not shown the Court that it was engaged in enquiries to confirm United States nationality.

70. Mr. Benavides (case No. 3) was carrying an Immigration and Naturalization Service immigration card at the time of arrest in 1991. The Court has not been made aware of any reason why the arresting authorities should

nonetheless have believed at the time of arrest that he was a United States national. The evidence that his defence counsel in June 1993 informed the court that Mr. Benavides had become a United States citizen is irrelevant to what was understood as to his nationality at time of arrest.

71. So far as Mr. Ochoa is concerned (case No. 18), the Court observes that his arrest report in 1990 refers to him as having been born in Mexico, an assertion that is repeated in a second police report. Some two years later details in his court record refer to him as a United States citizen born in Mexico. The Court is not provided with any further details. The United States has not shown this Court that it was aware of, or was engaged in active enquiry as to, alleged United States nationality at the time of his arrest.

72. Mr. Tafoya (case No. 24) was listed on the police booking sheet as having been born in Mexico. No further information is provided by the United States as to why this was done and what, if any, further enquiries were being made concerning the defendant's nationality.

73. Finally, the last of the seven persons referred to by the United States in this group, Mr. Alvarez (case No. 30), was arrested in Texas on 20 June 1998. Texas records identified him as a United States citizen. Within three days of his arrest, however, the Texas authorities were informed that the Immigration and Naturalization Service was holding investigations to determine whether, because of a previous conviction, Mr. Alvarez was subject to deportation as a foreign national. The Court has not been presented with evidence that rapid resolution was sought as to the question of Mr. Alvarez's nationality.

74. The Court concludes that Mexico has failed to prove the violation by the United States of its obligations under Article 36, paragraph 1 (b), in the case of Mr. Salcido (case No. 22), and his case will not be further commented upon. On the other hand, as regards the other individuals who are alleged to have claimed United States nationality on arrest, whose cases have been considered in paragraphs 67 to 73 above, the argument of the United States cannot be upheld.

75. The question nonetheless remains as to whether, in each of the 45 cases referred to in paragraph 65 and of the six cases mentioned in paragraphs 67 to 73, the United States did provide the required information to the arrested persons "without delay". It is to that question that the Court now turns.

76. The Court has been provided with declarations from a number of the Mexican nationals concerned that attest to their never being informed of their

rights under Article 36, paragraph 1 (b). The Court at the outset notes that, in 47 such cases, the United States nowhere challenges this fact of information not being given. Nevertheless, in the case of Mr. Hernández (case No. 34), the United States observes that

"Although the [arresting] officer did not ask Hernández Llanas whether he wanted them to inform the Mexican Consulate of his arrest, it was certainly not unreasonable for him to assume that an escaped convict would not want the Consulate of the country from which he escaped notified of his arrest."

The Court notes that the clear duty to provide consular information under Article 36, paragraph 1 (b), does not invite assumptions as to what the arrested person might prefer, as a ground for not informing him. It rather gives the arrested person, once informed, the right to say he nonetheless does not wish his consular post to be notified. It necessarily follows that in each of these 47 cases, the duty to inform "without delay" has been violated.

77. In four cases, namely Ayala (case No. 2), Esquivel (case No. 7), Juárez (case No. 10) and Solache (case No. 47), some doubts remain as to whether the information that was given was provided without delay. For these, some examination of the term is thus necessary.

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

79. Thus, in Mexico's view, it would follow that in any case in which a foreign national was interrogated before being informed of his rights under Article 36, there would ipso facto be a breach of that Article, however rapidly after the interrogation the information was given to the foreign national. Mexico accordingly includes the case of Mr. Juárez among those where it claims violation of Article 36, paragraph 1 (b), as he was interrogated before being informed of his consular rights, some 40 hours after arrest.

80. Mexico has also invoked the travaux préparatoires of the Vienna Convention in support of its interpretation of the requirement that the arrested person be informed "without delay" of the right to ask that the consular post be notified. In particular, Mexico recalled that the phrase proposed to the Conference by the International Law Commission, "without undue delay", was replaced by the United Kingdom proposal to delete the word "undue". The United Kingdom representative had explained that this would avoid the implication that "some delay was permissible" and no delegate had expressed dissent with the USSR and Japanese statements that the result of the amendment would be to require information "immediately".

81. The United States disputed this interpretation of the phrase "without delay". In its view it did not mean "immediately, and before interrogation" and such an understanding was supported neither by the terminology, nor by the object and purpose of the Vienna Convention, nor by its travaux préparatoires. In the booklet referred to in paragraph 63 above, the State Department explains that "without delay" means "there should be no deliberate delay" and that the required action should be taken "as soon as reasonably possible under the circumstances". It was normally to be expected that "notification to consular officers" would have been made "within 24 to 72 hours of the arrest or detention". The United States further contended that such an interpretation of the words "without delay" would be reasonable in itself and also allow a consistent interpretation of the phrase as it occurs in each of three different occasions in Article 36, paragraph 1 (b). As for the travaux préparatoires, they showed only that undue or deliberate delay had been rejected as unacceptable.

82. According to the United States, the purpose of Article 36 was to facilitate the exercise of consular functions by a consular officer:

"The significance of giving consular information to a national is thus limited . . . It is a procedural device that allows the foreign national to trigger the related process of notification . . . [It] cannot possibly be fundamental to the criminal justice process."

83. The Court now addresses the question of the proper interpretation of the expression "without delay" in the light of arguments put to it by the Parties. The Court begins by noting that the precise meaning of "without delay", as it is to be understood in Article 36, paragraph 1 (b), is not defined in the Convention. This phrase therefore requires interpretation according to the customary rules of treaty interpretation reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties.

84. Article 1 of the Vienna Convention on Consular Relations, which defines certain of the terms used in the Convention, offers no definition of the phrase "without delay". Moreover, in the different language versions of the Convention various terms are employed to render the phrases "without delay" in Article 36 and "immediately" in Article 14. The Court observes that dictionary definitions, in the various languages of the Vienna Convention, offer diverse meanings of the term "without delay" (and also of "immediately"). It is therefore necessary to look elsewhere for an understanding of this term.

85. As for the object and purpose of the Convention, the Court observes that Article 36 provides for consular officers to be free to communicate with nationals of the sending State, to have access to them, to visit and speak with them and to arrange for their legal representation. It is not envisaged, either in Article 36, paragraph 1, or elsewhere in the Convention, that consular functions entail a consular officer himself or herself acting as the legal representative or more directly engaging in the criminal justice process. Indeed, this is confirmed by the wording of Article 36, paragraph 2, of the Convention. Thus, neither the terms of the Convention as normally understood, nor its object and purpose, suggest that "without delay" is to be understood as "immediately upon arrest and before interrogation".

86. The Court further notes that, notwithstanding the uncertainties in the travaux préparatoires, they too do not support such an interpretation. During the diplomatic conference, the conference's expert, former Special Rapporteur of the International Law Commission, explained to the delegates that the words "without undue delay" had been introduced by the Commission, after long discussion in both the plenary and drafting committee, to allow for special circumstances which might permit information as to consular notification not to be given at once. Germany, the only one of two States to present an amendment, proposed adding "but at latest within one month". There was an extended discussion by many different delegates as to what such outer time-limit would be acceptable. During that debate no delegate proposed "immediately". The shortest specific period suggested was by the United Kingdom, namely "promptly" and no later than "48 hours" afterwards. Eventually, in the absence of agreement on a precise time period, the United Kingdom's other proposal to delete the word "undue" was accepted as the position around which delegates could converge. It is also of interest that there is no suggestion in the travaux that the phrase "without delay" might have different meanings in each of the three sets of circumstances in which it is used in Article 36, paragraph 1 (b).

87. The Court thus finds that "without delay" is not necessarily to be interpreted as "immediately" upon arrest. It further observes that during the Conference debates on this term, no delegate made any connection with the issue of interrogation. The Court considers that the provision in Article 36, paragraph 1 (b), that the receiving State authorities "shall inform the person concerned without delay of his rights" cannot be interpreted to signify that the provision of such information must necessarily precede any interrogation, so that the commencement of interrogation before the information is given would be a breach of Article 36.

88. Although, by application of the usual rules of interpretation, "without delay" as regards the duty to inform an individual under Article 36, paragraph 1 (b), is not to be understood as necessarily meaning "immediately upon arrest", there is nonetheless a duty upon the arresting authorities to give that information to an arrested person as soon as it is realized that the person is a foreign national, or once there are grounds to think that the person is probably a foreign national.

89. With one exception, no information as to entitlement to consular notification was given in any of the cases cited in paragraph 77 within any of the various time periods suggested by the delegates to the Conference on the Vienna Convention, or by the United States itself (see paragraphs 81 and 86 above). Indeed, the information was given either not at all or at periods very significantly removed from the time of arrest. In the case of Mr. Juárez (case No. 10), the defendant was informed of his consular rights 40 hours after his arrest. The Court notes, however, that Mr. Juárez's arrest report stated that he had been born in Mexico; moreover, there had been indications of his Mexican nationality from the time of his initial interrogation by agents of the Federal Bureau of Investigation (FBI) following his arrest. It follows that Mr. Juárez's Mexican nationality was apparent from the outset of his detention by the United States authorities. In these circumstances, in accordance with its interpretation of the expression "without delay" (see paragraph 88 above), the Court concludes that the United States violated the obligation incumbent upon it under Article 36, paragraph 1 (b), to inform Mr. Juárez without delay of his consular rights. The Court notes that the same finding was reached by a California Superior Court, albeit on different grounds.

90. The Court accordingly concludes that, with respect to each of the individuals listed in paragraph 16, with the exception of Mr. Salcido (case No. 22; see paragraph 74 above), the United States has violated its obligation under Article 36, paragraph 1 (b), of the Vienna Convention to provide information to the arrested person.

91. As noted above, Article 36, paragraph 1 (b), contains three elements. Thus far, the Court has been dealing with the right of an arrested person to be informed that he may ask for his consular post to be notified. The Court now turns to another aspect of Article 36, paragraph 1 (b). The Court finds the United States is correct in observing that the fact that a Mexican consular post was not notified under Article 36, paragraph 1 (b), does not of necessity show that the arrested person was not informed of his rights under that provision. He may have been informed and declined to have his consular post notified. The giving of the information is relevant, however, for satisfying the element in Article 36, paragraph 1 (b), on which the other two elements therein depend.

92. In only two cases has the United States claimed that the arrested person was informed of his consular rights but asked for the consular post not to be notified. These are Mr. Juárez (case No. 10) and Mr. Solache (case No. 47).

93. The Court is satisfied that when Mr. Juárez (case No. 10) was informed of his consular rights 40 hours after his arrest (see paragraph 89) he chose not to have his consular post notified. As regards Mr. Solache (case No. 47), however, it is not sufficiently clear to the Court, on the evidence before it, that he requested that his consular post should not be notified. Indeed, the Court has not been provided with any reasons as to why, if a request of non-notification was made, the consular post was then notified some three months later.

94. In a further three cases, the United States alleges that the consular post was formally notified of the detention of one of its Mexican nationals without prior information to the individual as to his consular rights. These are Mr. Covarrubias (case No. 6), Mr. Hernández (case No. 34) and Mr. Reyes (case No. 54). The United States further contends that the Mexican authorities were contacted regarding the case of Mr. Loza (case No. 52).

95. The Court notes that, in the case of Mr. Covarrubias (case No. 6), the consular authorities learned from third parties of his arrest shortly after it occurred. Some 16 months later, a court-appointed interpreter requested that the consulate intervene in the case prior to trial. It would appear doubtful whether an interpreter can be considered a competent authority for triggering the interrelated provisions of Article 36, paragraph 1 (b), of the Vienna Convention. In the case of Mr. Reyes (case No. 34), the United States has simply told the Court that an Oregon Department of Justice attorney had advised United States authorities that both the District Attorney and the arresting detective advised the Mexican consular authorities of his arrest. No information is given as to when

this occurred, in relation to the date of his arrest. Mr. Reyes did receive assistance before his trial. In these two cases, the Court considers that, even on the hypothesis that the conduct of the United States had no serious consequences for the individuals concerned, it did nonetheless constitute a violation of the obligations incumbent upon the United States under Article 36, paragraph 1 (b).

96. In the case of Mr. Loza (case No. 52), a United States Congressman from Ohio contacted the Mexican Embassy on behalf of Ohio prosecutors, some four months after the accused's arrest, "to enquire about the procedures for obtaining a certified copy of Loza's birth certificate". The Court has not been provided with a copy of the Congressman's letter and is therefore unable to ascertain whether it explained that Mr. Loza had been arrested. The response from the Embassy (which is also not included in the documentation provided to the Court) was passed by the Congressman to the prosecuting attorney, who then asked the Civil Registry of Guadalajara for a copy of the birth certificate. This request made no specific mention of Mr. Loza's arrest. Mexico contends that its consulate was never formally notified of Mr. Loza's arrest, of which it only became aware after he had been convicted and sentenced to death. Mexico includes the case of Mr. Loza among those in which the United States was in breach of its obligation of consular notification. Taking account of all these elements, and in particular of the fact that the Embassy was contacted four months after the arrest, and that the consular post became aware of the defendant's detention only after he had been convicted and sentenced, the Court concludes that in the case of Mr. Loza the United States violated the obligation of consular notification without delay incumbent upon it under Article 36, paragraph 1 (b).

97. Mr. Hernández (case No. 34) was arrested in Texas on Wednesday 15 October 1997. The United States authorities had no reason to believe he might have American citizenship. The consular post was notified the following Monday, that is five days (corresponding to only three working days) thereafter. The Court finds that, in the circumstances, the United States did notify the consular post without delay, in accordance with its obligation under Article 36, paragraph 1 (b).

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

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

100. It is necessary to revisit the interrelationship of the three subparagraphs of Article 36, paragraph 1, in the light of the particular facts and circumstances of the present case.

101. The Court would first recall that, in the case of Mr. Juárez (case No. 10) (see paragraph 93 above), when the defendant was informed of his rights, he declined to have his consular post notified. Thus in this case there was no violation of either subparagraph (a) or subparagraph (c) of Article 36, paragraph 1.

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

103. The same is true, pari passu, of certain rights identified in subparagraph (c): “consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, and to converse and correspond with him . . .”

104. On the other hand, and on the particular facts of this case, no such generalized answer can be given as regards a further entitlement mentioned in subparagraph (c), namely, the right of consular officers “to arrange for [the] legal representation” of the foreign national. Mexico has laid much emphasis in this litigation upon the importance of consular officers being able to arrange for such representation before and during trial, and especially at sentencing, in cases in which a severe penalty may be imposed. Mexico has further indicated the importance of any financial or other assistance that consular officers may

provide to defence counsel, inter alia for investigation of the defendant's family background and mental condition, when such information is relevant to the case. The Court observes that the exercise of the rights of the sending State under Article 36, paragraph 1 (c), depends upon notification by the authorities of the receiving State. It may be, however, that information drawn to the attention of the sending State by other means may still enable its consular officers to assist in arranging legal representation for its national. In the following cases, the Mexican consular authorities learned of their national's detention in time to provide such assistance, either through notification by United States authorities (albeit belatedly in terms of Article 36, paragraph 1 (b)) or through other channels: Benavides (case No. 3); Covarrubias (case No. 6); Esquivel (case No. 7); Hoyos (case No. 9); Mendoza (case No. 17); Ramírez (case No. 20); Sánchez (case No. 23); Verano (case No. 27); Zamudio (case No. 29); Gómez (case No. 33); Hernández (case No. 34); Ramírez (case No. 41); Rocha (case No. 42); Solache (case No. 47); Camargo (case No. 49) and Reyes (case No. 54).

105. In relation to Mr. Manríquez (case No. 14), the Court lacks precise information as to when his consular post was notified. It is merely given to understand that it was two years prior to conviction, and that Mr. Manríquez himself had never been informed of his consular rights. There is also divergence between the Parties in regard to the case of Mr. Fuentes (case No. 15), where Mexico claims it became aware of his detention during trial and the United States says this occurred during jury selection, prior to the actual commencement of the trial. In the case of Mr. Arias (case No. 44), the Mexican authorities became aware of his detention less than one week before the commencement of the trial. In those three cases, the Court concludes that the United States violated its obligations under Article 36, paragraph 1 (c).

106. On this aspect of the case, the Court thus concludes:

(1) that the United States committed breaches of the obligation incumbent upon it under Article 36, paragraph 1 (b), of the Vienna Convention to inform detained Mexican nationals of their rights under that paragraph, in the case of the following 51 individuals: Avena (case No. 1), Ayala (case No. 2), Benavides (case No. 3), Carrera (case No. 4), Contreras (case No. 5), Covarrubias (case No. 6), Esquivel (case No. 7), Gómez (case No. 8), Hoyos (case No. 9), Juárez (case No. 10), López (case No. 11), Lupercio (case No. 12), Maciel (case No. 13), Manríquez (case No. 14), Fuentes (case No. 15), Martínez (case No. 16), Mendoza (case No. 17), Ochoa (case No. 18), Parra (case No. 19), Ramírez (case No. 20), Salazar (case No. 21), Sánchez (case No. 23), Tafoya (case No. 24), Valdez (case No. 25), Vargas (case No. 26), Verano (case

No. 27), Zamudio (case No. 29), Alvarez (case No. 30), Fierro (case No. 31), García (case No. 32), Gómez (case No. 33), Hernández (case No. 34), Ibarra (case No. 35), Leal (case No. 36), Maldonado (case No. 37), Medellín (case No. 38), Moreno (case No. 39), Plata (case No. 40), Ramírez (case No. 41), Rocha (case No. 42), Regalado (case No. 43), Arias (case No. 44), Caballero (case No. 45), Flores (case No. 46), Solache (case No. 47), Fong (case No. 48), Camargo (case No. 49), Pérez (case No. 51), Loza (case No. 52), Torres (case No. 53) and Reyes (case No. 54);

(2) that the United States committed breaches of the obligation incumbent upon it under Article 36, paragraph 1 (b) to notify the Mexican consular post of the detention of the Mexican nationals listed in subparagraph (1) above, except in the cases of Mr. Juárez (No. 10) and Mr. Hernández (No. 34);

(3) that by virtue of its breaches of Article 36, paragraph 1 (b), as described in subparagraph (2) above, the United States also violated the obligation incumbent upon it under Article 36, paragraph 1 (a), of the Vienna Convention to enable Mexican consular officers to communicate with and have access to their nationals, as well as its obligation under paragraph 1 (c) of that Article regarding the right of consular officers to visit their detained nationals;

(4) that the United States, by virtue of these breaches of Article 36, paragraph 1 (b), also violated the obligation incumbent upon it under paragraph 1 (c) of that Article to enable Mexican consular officers to arrange for legal representation of their nationals in the case of the following individuals: Avena (case No. 1), Ayala (case No. 2), Carrera (case No. 4), Contreras (case No. 5), Gómez (case No. 8), López (case No. 11), Lupercio (case No. 12), Maciel (case No. 13), Manríquez (case No. 14), Fuentes (case No. 15), Martínez (case No. 16), Ochoa (case No. 18), Parra (case No. 19), Salazar (case No. 21), Tafoya (case No. 24), Valdez (case No. 25), Vargas (case No. 26), Alvarez (case No. 30), Fierro (case No. 31), García (case No. 32), Ibarra (case No. 35), Leal (case No. 36), Maldonado (case No. 37), Medellín (case No. 38), Moreno (case No. 39), Plata (case No. 40), Regalado (case No. 43), Arias (case No. 44), Caballero (case No. 45), Flores (case No. 46), Fong (case No. 48), Pérez (case No. 51), Loza (case No. 52) and Torres (case No. 53).

*

Article 36, paragraph 2

107. In its third final submission Mexico asks the Court to adjudge and declare that "the United States violated its obligations under Article 36 (2) of the Vienna Convention by failing to provide meaningful and effective review and reconsideration of convictions and sentences impaired by a violation of Article 36 (1)".

108. Article 36, paragraph 2, provides:

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

109. In this connection, Mexico has argued that the United States

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

More specifically, Mexico contends that:

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

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

"the criminal justice systems of the United States address all errors in process through both judicial and executive clemency proceedings, relying upon the latter when rules of default have closed out the possibility of the former. That is, the 'laws and regulations' of the United States provide for the correction of mistakes that may be relevant to a criminal defendant to occur

through a combination of judicial review and clemency. These processes together, working with other competent authorities, give full effect to the purposes for which Article 36 (1) is intended, in conformity with Article 36 (2). And, insofar as a breach of Article 36 (1) has occurred, these procedures satisfy the remedial function of Article 36 (2) by allowing the United States to provide review and reconsideration of convictions and sentences consistent with LaGrand."

111. The "procedural default" rule in United States law has already been brought to the attention of the Court in the LaGrand case. The following brief definition of the rule was provided by Mexico in its Memorial in this case and has not been challenged by the United States: "a defendant who could have raised, but fails to raise, a legal issue at trial will generally not be permitted to raise it in future proceedings, on appeal or in a petition for a writ of habeas corpus".

The rule requires exhaustion of remedies, inter alia, at the state level and before a habeas corpus motion can be filed with federal courts. In the LaGrand case, the rule in question was applied by United States federal courts; in the present case, Mexico also complains of the application of the rule in certain state courts of criminal appeal.

112. The Court has already considered the application of the "procedural default" rule, alleged by Mexico to be a hindrance to the full implementation of the international obligations of the United States under Article 36, in the LaGrand case, when the Court addressed the issue of its implications for the application of Article 36, paragraph 2, of the Vienna Convention. The Court emphasized that "a distinction must be drawn between that rule as such and its specific application in the present case". The Court stated:

"In itself, the rule does not violate Article 36 of the Vienna Convention. The problem arises when the procedural default rule does not allow the detained individual to challenge a conviction and sentence by claiming, in reliance on Article 36, paragraph 1, of the Convention, that the competent national authorities failed to comply with their obligation to provide the requisite consular information 'without delay', thus preventing the person from seeking and obtaining consular assistance from the sending State." (I.C.J. Reports 2001, p. 497, para. 90.) On this basis, the Court concluded that "the procedural default rule prevented counsel for the LaGrands to effectively challenge their convictions and sentences other than on United States constitutional grounds" (ibid., para. 91). This statement of the Court seems equally valid in relation to

the present case, where a number of Mexican nationals have been placed exactly in such a situation.

113. The Court will return to this aspect below, in the context of Mexico's claims as to remedies. For the moment, the Court simply notes that the procedural default rule has not been revised, nor has any provision been made to prevent its application in cases where it has been the failure of the United States itself to inform that may have precluded counsel from being in a position to have raised the question of a violation of the Vienna Convention in the initial trial. It thus remains the case that the procedural default rule may continue to prevent courts from attaching legal significance to the fact, inter alia, that the violation of the rights set forth in Article 36, paragraph 1, prevented Mexico, in a timely fashion, from retaining private counsel for certain nationals and otherwise assisting in their defence. In such cases, application of the procedural default rule would have the effect of preventing "full effect [from being] given to the purposes for which the rights accorded under this article are intended", and thus violate paragraph 2 of Article 36. The Court notes moreover that in several of the cases cited in Mexico's final submissions the procedural default rule has already been applied, and that in others it could be applied at subsequent stages in the proceedings. However, in none of the cases, save for the three mentioned in paragraph 114 below, have the criminal proceedings against the Mexican nationals concerned already reached a stage at which there is no further possibility of judicial re-examination of those cases; that is to say, all possibility is not yet excluded of "review and reconsideration" of conviction and sentence, as called for in the LaGrand case, and as explained further in paragraphs 128 and following below. It would therefore be premature for the Court to conclude at this stage that, in those cases, there is already a violation of the obligations under Article 36, paragraph 2, of the Vienna Convention.

114. By contrast, the Court notes that in the case of three Mexican nationals, Mr. Fierro (case No. 31), Mr. Moreno (case No. 39), and Mr. Torres (case No. 53), conviction and sentence have become final. Moreover, in the case of Mr. Torres the Oklahoma Court of Criminal Appeals has set an execution date (see paragraph 21 above, in fine). The Court must therefore conclude that, in relation to these three individuals, the United States is in breach of the obligations incumbent upon it under Article 36, paragraph 2, of the Vienna Convention.

* *

Legal consequences of the breach

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

116. Mexico in its fourth, fifth and sixth submissions asks the Court to adjudge and declare:

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

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

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

117. In support of its fourth and fifth submissions, Mexico argues that "It is well-established that the primary form of reparation available to a State injured by an internationally wrongful act is restitutio in integrum", and that "The United States is therefore obliged to take the necessary action to restore the status quo ante in respect of Mexico's nationals detained, tried, convicted and sentenced in violation of their internationally recognized rights". To restore the status quo ante, Mexico contends that "restitution here must take the form of annulment of the convictions and sentences that resulted from the proceedings tainted by the Article 36 violations", and that "It follows from the very nature of restitutio that, when a violation of an international obligation is manifested in a judicial act, that act must be annulled and thereby deprived of any force or effect in the national legal system". Mexico therefore asks in its submissions that the convictions and sentences of the 52 Mexican nationals be annulled, and that, in any future criminal proceedings against these 52 Mexican nationals, evidence obtained in breach of Article 36 of the Vienna Convention be excluded.

118. The United States on the other hand argues:

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

119. The general principle on the legal consequences of the commission of an internationally wrongful act was stated by the Permanent Court of International Justice in the Factory at Chorzów case as follows: "It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form." (Factory at Chorzów, Jurisdiction, 1927, P.C.I.J., Series A, No. 9, p. 21.) What constitutes "reparation in an adequate form" clearly varies depending upon the concrete circumstances surrounding each case and the precise nature and scope of the injury, since the question has to be examined from the viewpoint of what is the "reparation in an adequate form" that corresponds to the injury. In a subsequent phase of the same case, the Permanent Court went on to elaborate on this point as follows:

"The essential principle contained in the actual notion of an illegal act • a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals • is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed." (Factory at Chorzów, Merits, 1928, P.C.I.J., Series A, No. 17, p. 47.)

120. In the LaGrand case the Court made a general statement on the principle involved as follows:

"The Court considers in this respect that if the United States, notwithstanding its commitment [to ensure implementation of the specific measures adopted in performance of its obligations under Article 36, paragraph 1 (b)], should fail in its obligation of consular notification to the detriment of German nationals, an apology would not suffice in cases where the individuals concerned have been subjected to prolonged detention or convicted and sentenced to severe penalties. In the case of such a conviction and sentence, it would be incumbent upon the United States to allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention. This obligation can be carried out in various ways. The choice of means must be left to the United States." (I.C.J. Reports 2001, pp. 513-514, para. 125.)

121. Similarly, in the present case the Court's task is to determine what would be adequate reparation for the violations of Article 36. It should be clear from what has been observed above that the internationally wrongful acts committed by the United States were the failure of its competent authorities to inform the Mexican nationals concerned, to notify Mexican consular posts and to enable Mexico to provide consular assistance. It follows that the remedy to make good these violations should consist in an obligation on the United States to permit review and reconsideration of these nationals' cases by the United States courts, as the Court will explain further in paragraphs 128 to 134 below, with a view to ascertaining whether in each case the violation of Article 36 committed by the competent authorities caused actual prejudice to the defendant in the process of administration of criminal justice.

122. The Court reaffirms that the case before it concerns Article 36 of the Vienna Convention and not the correctness as such of any conviction or sentencing. The question of whether the violations of Article 36, paragraph 1, are to be regarded as having, in the causal sequence of events, ultimately led to convictions and severe penalties is an integral part of criminal proceedings before the courts of the United States and is for them to determine in the process of review and reconsideration. In so doing, it is for the courts of the United States to examine the facts, and in particular the prejudice and its causes, taking account of the violation of the rights set forth in the Convention.

123. It is not to be presumed, as Mexico asserts, that partial or total annulment of conviction or sentence provides the necessary and sole remedy. In this regard, Mexico cites the recent Judgment of this Court in the case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), in which the "Court ordered the cancellation of an arrest warrant issued by a Belgian judicial official in violation of the international immunity of the Congo Minister for Foreign Affairs". However, the present case has clearly to be distinguished from the Arrest Warrant case. In that case, the question of the legality under international law of the act of issuing the arrest warrant against the Congolese Minister for Foreign Affairs by the Belgian judicial authorities was itself the subject-matter of the dispute. Since the Court found that act to be in violation of international law relating to immunity, the proper legal consequence was for the Court to order the cancellation of the arrest warrant in question (I.C.J. Reports 2002, p. 33). By contrast, in the present case it is not the convictions and sentences of the Mexican nationals which are to be regarded as a violation of international law, but solely certain breaches of treaty obligations which preceded them.

124. Mexico has further contended that the right to consular notification and consular communication under the Vienna Convention is a fundamental human right that constitutes part of due process in criminal proceedings and should be guaranteed in the territory of each of the Contracting Parties to the Vienna Convention; according to Mexico, this right, as such, is so fundamental that its infringement will ipso facto produce the effect of vitiating the entire process of the criminal proceedings conducted in violation of this fundamental right. Whether or not the Vienna Convention rights are human rights is not a matter that this Court need decide. The Court would, however, observe that neither the text nor the object and purpose of the Convention, nor any indication in the travaux préparatoires, support the conclusion that Mexico draws from its contention in that regard.

125. For these reasons, Mexico's fourth and fifth submissions cannot be upheld.

126. The reasoning of the Court on the fifth submission of Mexico is equally valid in relation to the sixth submission of Mexico. In elaboration of its sixth submission, Mexico contends that "As an aspect of restitutio in integrum, Mexico is also entitled to an order that in any subsequent criminal proceedings against the nationals, statements and confessions obtained prior to notification to the national of his right to consular assistance be excluded". Mexico argues that "The exclusionary rule applies in both common law and civil law jurisdictions and requires the exclusion of evidence that is obtained in a manner that violates due process obligations", and on this basis concludes that

"The status of the exclusionary rule as a general principle of law permits the Court to order that the United States is obligated to apply this principle in respect of statements and confessions given to United States law enforcement officials prior to the accused Mexican nationals being advised of their consular rights in any subsequent criminal proceedings against them."

127. The Court does not consider that it is necessary to enter into an examination of the merits of the contention advanced by Mexico that the "exclusionary rule" is "a general principle of law under Article 38(1) (c) of the Statute" of the Court. The issue raised by Mexico in its sixth submission relates to the question of what legal consequences flow from the breach of the obligations under Article 36, paragraph 1 • a question which the Court has already sufficiently discussed above in relation to the fourth and the fifth submissons of Mexico. The Court is of the view that this question is one which has to be examined under the concrete circumstances of each case by the United

States courts concerned in the process of their review and reconsideration. For this reason, the sixth submission of Mexico cannot be upheld.

128. While the Court has rejected the fourth, fifth and sixth submissions of Mexico relating to the remedies for the breaches by the United States of its international obligations under Article 36 of the Vienna Convention, the fact remains that such breaches have been committed, as the Court has found, and it is thus incumbent upon the Court to specify what remedies are required in order to redress the injury done to Mexico and to its nationals by the United States through non-compliance with those international obligations. As has already been observed in paragraph 120, the Court in the LaGrand Judgment stated the general principle to be applied in such cases by way of a remedy to redress an injury of this kind (I.C.J. Reports 2001, pp. 513-514, para. 125).

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

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

130. On this question of "review and reconsideration", the United States takes the position that it has indeed conformed its conduct to the LaGrand Judgment. In a further elaboration of this point, the United States argues that "[t]he Court said in LaGrand that the choice of means for allowing the review and reconsideration it called for 'must be left' to the United States", but that "Mexico would not leave this choice to the United States but have the Court undertake the review instead and decide at once that the breach requires the conviction and sentence to be set aside in each case".

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

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

132. The United States argues (1) "that the Court's decision in LaGrand in calling for review and reconsideration called for a process to re-examine a conviction and sentence in light of a breach of Article 36"; (2) that "in calling for a process of review, the Court necessarily implied that one legitimate result of that process might be a conclusion that the conviction and sentence should stand"; and (3) "that the relief Mexico seeks in this case is flatly inconsistent with the Judgment in LaGrand: it seeks precisely the award of a substantive outcome that the LaGrand Court declined to provide".

133. However, the Court wishes to point out that the current situation in the United States criminal procedure, as explained by the Agent at the hearings, is that "If the defendant alleged at trial that a failure of consular information resulted in harm to a particular right essential to a fair trial, an appeals court can review how the lower court handled that claim of prejudice", but that "If the foreign national did not raise his Article 36 claim at trial, he may face procedural constraints [i.e., the application of the procedural default rule] on raising that particular claim in direct or collateral judicial appeals" (emphasis added). As a result, a claim based on the violation of Article 36, paragraph 1, of the Vienna Convention, however meritorious in itself, could be barred in the courts of the United States by the operation of the procedural default rule (see paragraph 111 above).

134. It is not sufficient for the United States to argue that "[w]hatever label [the Mexican defendant] places on his claim, his right . . . must and will be vindicated if it is raised in some form at trial" (emphasis added), and that

"In that way, even though a failure to label the complaint as a breach of the Vienna Convention may mean that he has technically speaking forfeited his right to raise this issue as a Vienna Convention claim, on appeal that failure would not bar him from independently asserting a claim that he was prejudiced because he lacked this critical protection needed for a fair trial." (Emphasis added.)

The crucial point in this situation is that, by the operation of the procedural default rule as it is applied at present, the defendant is effectively barred from raising the issue of the violation of his rights under Article 36 of the Vienna Convention and is limited to seeking the vindication of his rights under the United States Constitution.

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135. Mexico, in the latter part of its seventh submission, has stated that "this obligation [of providing review and reconsideration] cannot be satisfied by means of clemency proceedings". Mexico elaborates this point by arguing first of all that "the United States's reliance on clemency proceedings is wholly inconsistent with its obligation to provide a remedy, as that obligation was found by this Court in LaGrand". More specifically, Mexico contends:

"First, it is clear that the Court's direction to the United States in LaGrand clearly contemplated that 'review and reconsideration' would be carried out by judicial procedures . . .

Second, the Court was fully aware that the LaGrand brothers had received a clemency hearing, during which the Arizona Pardons Board took into account the violation of their consular rights. Accordingly, the Court determined in LaGrand that clemency review alone did not constitute the required 'review and reconsideration' . . .

Finally, the Court specified that the United States must 'allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention' . . . it is a basic matter of U.S. criminal procedural law that courts review convictions; clemency panels do not. With the rare exception of pardons based on actual innocence, the focus of capital clemency review is on the propriety of the sentence and not on the underlying conviction." Furthermore, Mexico argues that the clemency process is in itself an ineffective remedy to satisfy the international obligations of the United States. It concludes: "clemency review is standardless, secretive, and immune from judicial oversight". Finally, in support of its contention, Mexico argues that

"the failure of state clemency authorities to pay heed to the intervention of the U.S. Department of State in cases of death-sentenced Mexican nationals refutes the [United States] contention that clemency review will provide meaningful consideration of the violations of rights conferred under Article 36".

136. Against this contention of Mexico, the United States claims that it "gives 'full effect' to the 'purposes for which the rights accorded under [Article 36, paragraph 1,] are intended' through executive clemency". It argues that "[t]he clemency process . . . is well suited to the task of providing review and reconsideration". The United States explains that "Clemency . . . is more than a

matter of grace; it is part of the overall scheme for ensuring justice and fairness in the legal process" and that "Clemency procedures are an integral part of the existing 'laws and regulations' of the United States through which errors are addressed".

137. Specifically in the context of the present case, the United States contends that the following two points are particularly noteworthy:

"First, these clemency procedures allow for broad participation by advocates of clemency, including an inmate's attorney and the sending state's consular officer . . . Second, these clemency officials are not bound by principles of procedural default, finality, prejudice standards, or any other limitations on judicial review. They may consider any facts and circumstances that they deem appropriate and relevant, including specifically Vienna Convention claims".

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

139. Accordingly, in a situation of the violation of rights under Article 36, paragraph 1, of the Vienna Convention, the defendant raises his claim in this respect not as a case of "harm to a particular right essential to a fair trial" • a concept relevant to the enjoyment of due process rights under the United States Constitution • but as a case involving the infringement of his rights under Article 36, paragraph 1. The rights guaranteed under the Vienna Convention are treaty rights which the United States has undertaken to comply with in relation to the individual concerned, irrespective of the due process rights under United States constitutional law. In this regard, the Court would point out that what is crucial in the review and reconsideration process is the existence of a procedure which guarantees that full weight is given to the violation of the rights set forth in the Vienna Convention, whatever may be the actual outcome of such review and reconsideration.

140. As has been explained in paragraphs 128 to 134 above, the Court is of the view that, in cases where the breach of the individual rights of Mexican nationals under Article 36, paragraph 1 (b), of the Convention has resulted, in the sequence of judicial proceedings that has followed, in the individuals

concerned being subjected to prolonged detention or convicted and sentenced to severe penalties, the legal consequences of this breach have to be examined and taken into account in the course of review and reconsideration. The Court considers that it is the judicial process that is suited to this task.

141. The Court in the LaGrand case left to the United States the choice of means as to how review and reconsideration should be achieved, especially in the light of the procedural default rule. Nevertheless, the premise on which the Court proceeded in that case was that the process of review and reconsideration should occur within the overall judicial proceedings relating to the individual defendant concerned.

142. As regards the clemency procedure, the Court notes that this performs an important function in the administration of criminal justice in the United States and is “the historic remedy for preventing miscarriages of justice where judicial process has been exhausted” (Herrera v. Collins, 506 U.S. 390 (1993) at pp. 411-412). The Court accepts that executive clemency, while not judicial, is an integral part of the overall scheme for ensuring justice and fairness in the legal what is at issue in the present case is not whether executive clemency as an institution is or is not an integral part of the “existing laws and regulations of the United States”, but whether the clemency process as practised within the criminal justice systems of different states in the United States can, in and of itself, qualify as an appropriate means for undertaking the effective “review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention”, as the Court prescribed in the LaGrand Judgment (I.C.J. Reports 2001, p. 514, para. 125).

143. It may be true, as the United States argues, that in a number of cases “clemency in fact results in pardons of convictions as well as commutations of sentences”. In that sense and to that extent, it might be argued that the facts demonstrated by the United States testify to a degree of effectiveness of the clemency procedures as a means of relieving defendants on death row from execution. The Court notes, however, that the clemency process, as currently practised within the United States criminal justice system, does not appear to meet the requirements described in paragraph 138 above and that it is therefore not sufficient in itself to serve as an appropriate means of “review and reconsideration” as envisaged by the Court in the LaGrand case. The Court considers nevertheless that appropriate clemency procedures can supplement judicial review and reconsideration, in particular where the judicial system has failed to take due account of the violation of the rights set forth in the Vienna Convention, as has occurred in the case of the three Mexican nationals referred to in paragraph 114 above.

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144. Finally, the Court will consider the eighth submission of Mexico, in which it asks the Court to adjudge and declare:

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

145. In this respect, Mexico recognizes the efforts by the United States to raise awareness of consular assistance rights, through the distribution of pamphlets and pocket cards and by the conduct of training programmes, and that the measures adopted by the United States to that end were noted by the Court in its decision in the LaGrand case (I.C.J. Reports 2001, pp. 511-513, paras. 121, 123-124). Mexico, however, notes with regret that "the United States 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".

146. In particular, Mexico claims in relation to the violation of the obligations under Article 36, paragraph 1, of the Vienna Convention:

"First, competent authorities of the United States regularly fail to provide the timely notification required by Article 36(1)(b) and thereby to [sic] frustrate the communication and access contemplated by Article 36(1)(a) and the assistance contemplated by Article 36(1)(c). These violations continue notwithstanding the Court's judgment in LaGrand and the program described there.

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."

Furthermore, in relation to the violation of the obligations under Article 36, paragraph 2, of the Vienna Convention, Mexico claims:

"Second, courts in the United States continue to apply doctrines of procedural default and non-retroactivity that prevent those courts from reaching

the merits of Vienna Convention claims, and those courts that have addressed the merits of those claims (because no procedural bar applies) have repeatedly held that no remedy is available for a breach of the obligations of Article 36 . . . Likewise, the United States' reliance on clemency proceedings to meet LaGrand's requirement of review and reconsideration represents a deliberate decision to allow these legal rules and doctrines to continue to have their inevitable effect. Hence, the United States continues to breach Article 36(2) by failing to give full effect to the purposes for which the rights accorded under Article 36 are intended."

147. The United States contradicts this contention of Mexico by claiming that "its efforts to improve the conveyance of information about consular notification are continuing unabated and are achieving tangible results". It contends that Mexico "fails to establish a 'regular and continuing' pattern of breaches of Article 36 in the wake of LaGrand".

148. Mexico emphasizes the necessity of requiring the cessation of the wrongful acts because, it alleges, the violation of Article 36 with regard to Mexico and its 52 nationals still continues. The Court considers, however, that Mexico has not established a continuing violation of Article 36 of the Vienna Convention with respect to the 52 individuals referred to in its final submissions; it cannot therefore uphold Mexico's claim seeking cessation. The Court would moreover point out that, inasmuch as these 52 individual cases are at various stages of criminal proceedings before the United States courts, they are in the state of pendente lite; and the Court has already indicated in respect of them what it regards as the appropriate remedy, namely review and reconsideration by reference to the breach of the Vienna Convention.

149. The Mexican request for guarantees of non-repetition is based on its contention that beyond these 52 cases there is a "regular and continuing" pattern of breaches by the United States of Article 36. In this respect, the Court observes that there is no evidence properly before it that would establish a general pattern. While it is a matter of concern that, even in the wake of the LaGrand Judgment, there remain a substantial number of cases of failure to carry out the obligation to furnish consular information to Mexican nationals, the Court notes that the United States has been making considerable efforts to ensure that its law enforcement authorities provide consular information to every arrested person they know or have reason to believe is a foreign national.

Especially at the stage of pre-trial consular information, it is noteworthy that the United States has been making good faith efforts to implement the obligations incumbent upon it under Article 36, paragraph 1, of the Vienna Convention, through such measures as a new outreach programme launched in

1998, including the dissemination to federal, state and local authorities of the State Department booklet mentioned above in paragraph 63. The Court wishes to recall in this context what it has said in paragraph 64 about efforts in some jurisdictions to provide the information under Article 36, paragraph 1 (b), in parallel with the reading of the "Miranda rights".

150. The Court would further note in this regard that in the LaGrand case Germany sought, inter alia, "a straightforward assurance that the United States will not repeat its unlawful acts" (I.C.J. Reports 2001, p. 511, para. 120). With regard to this general demand for an assurance of non-repetition, the Court stated:

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

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151. The Court would now re-emphasize a point of importance. In the present case, it has had occasion to examine the obligations of the United States under Article 36 of the Vienna Convention in relation to Mexican nationals sentenced to death in the United States. Its findings as to the duty of review and reconsideration of convictions and sentences have been directed to the circumstance of severe penalties being imposed on foreign nationals who happen to be of Mexican nationality. To avoid any ambiguity, it should be made clear that, while what the Court has stated concerns the Mexican nationals whose cases have been brought before it by Mexico, the Court has been addressing the issues of principle raised in the course of the present proceedings

from the viewpoint of the general application of the Vienna Convention, and there can be no question of making an a contrario argument in respect of any of the Court's findings in the present Judgment. In other words, the fact that in this case the Court's ruling has concerned only Mexican nationals cannot be taken to imply that the conclusions reached by it in the present Judgment do not apply to other foreign nationals finding themselves in similar situations in the United States.

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152. By its Order of 5 February 2003 the Court, acting on a request by Mexico, indicated by way of provisional measure that "The United States of America shall take all measures necessary to ensure that Mr. César Roberto Fierro Reyna, Mr. Roberto Moreno Ramos and Mr. Osvaldo Torres Aguilera are not executed pending final judgment in these proceedings" (I.C.J. Reports 2003, pp. 91-92, para. 59 (I)) (see paragraph 21 above). The Order of 5 February 2003, according to its terms and to Article 41 of the Statute, was effective pending final judgment, and the obligations of the United States in that respect are, with effect from the date of the present Judgment, replaced by those declared in this Judgment. The Court has rejected Mexico's submission that, by way of restitutio in integrum, the United States is obliged to annul the convictions and sentences of all of the Mexican nationals the subject of its claims (see above, paragraphs 115-125). The Court has found that, in relation to these three persons (among others), the United States has committed breaches of its obligations under Article 36, paragraph 1 (b), of the Vienna Convention and Article 36, paragraphs 1 (a) and (c), of that Convention; moreover, in respect of those three persons alone, the United States has also committed breaches of Article 36, paragraph 2, of the said Convention. The review and reconsideration of conviction and sentence required by Article 36, paragraph 2, which is the appropriate remedy for breaches of Article 36, paragraph 1, has not been carried out. The Court considers that in these three cases it is for the United States to find an appropriate remedy having the nature of review and reconsideration according to the criteria indicated in paragraphs 138 et seq. of the present Judgment.

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153. For these reasons,

THE COURT,

(1) By thirteen votes to two,

Rejects the objection by the United Mexican States to the admissibility of the objections presented by the United States of America to the jurisdiction of the Court and the admissibility of the Mexican claims;

IN FAVOUR: President Shi; Vice-President Ranjeva; Judges Guillaume, Koroma, Vereshchetin, Higgins, Kooijmans, Rezek, Al-Khasawneh, Buergenthal, Elaraby, Owada,Tomka;

AGAINST: Judge Parra-Aranguren; Judge ad hoc Sepúlveda;

(2) Unanimously,

Rejects the four objections by the United States of America to the jurisdiction of the Court;

(3) Unanimously,

Rejects the five objections by the United States of America to the admissibility of the claims of the United Mexican States;

(4) By fourteen votes to one,

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

IN FAVOUR: President Shi; Vice-President Ranjeva; Judges Guillaume, Koroma, Vereshchetin, Higgins, Kooijmans, Rezek, Al-Khasawneh, Buergenthal, Elaraby, Owada, Tomka; Judge ad hoc Sepúlveda;

AGAINST: Judge Parra-Aranguren;

(5) By fourteen votes to one,

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

IN FAVOUR: President Shi; Vice-President Ranjeva; Judges Guillaume, Koroma, Vereshchetin, Higgins, Kooijmans, Rezek, Al-Khasawneh, Buergenthal, Elaraby, Owada, Tomka; Judge ad hoc Sepúlveda;

AGAINST: Judge Parra-Aranguren;

(6) By fourteen votes to one,

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

IN FAVOUR: President Shi; Vice-President Ranjeva; Judges Guillaume, Koroma, Vereshchetin, Higgins, Kooijmans, Rezek, Al-Khasawneh, Buergenthal, Elaraby, Owada, Tomka; Judge ad hoc Sepúlveda;

AGAINST: Judge Parra-Aranguren;

(7) By fourteen votes to one,

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

IN FAVOUR: President Shi; Vice-President Ranjeva; Judges Guillaume, Koroma, Vereshchetin, Higgins, Kooijmans, Rezek, Al-Khasawneh, Buergenthal, Elaraby, Owada, Tomka; Judge ad hoc Sepúlveda;

AGAINST: Judge Parra-Aranguren;

(8) By fourteen votes to one,

Finds that, by not permitting the review and reconsideration, in the light of the rights set forth in the Convention, of the conviction and sentences of Mr. César Roberto Fierro Reyna, Mr. Roberto Moreno Ramos and Mr. Osvaldo Torres Aguilera, after the violations referred to in subparagraph (4) above had been established in respect of those individuals, the United States of America breached the obligations incumbent upon it under Article 36, paragraph 2, of the Convention;

IN FAVOUR: President Shi; Vice-President Ranjeva; Judges Guillaume, Koroma, Vereshchetin, Higgins, Kooijmans, Rezek, Al-Khasawneh, Buergenthal, Elaraby, Owada, Tomka; Judge ad hoc Sepúlveda;

AGAINST: Judge Parra-Aranguren;

(9) By fourteen votes to one,

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

IN FAVOUR: President Shi; Vice-President Ranjeva; Judges Guillaume, Koroma, Vereshchetin, Higgins, Kooijmans, Rezek, Al-Khasawneh, Buergenthal, Elaraby, Owada, Tomka; Judge ad hoc Sepúlveda;

AGAINST: Judge Parra-Aranguren;

(10) Unanimously,

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

(11) Unanimously,

James A. Graham

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

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this thirty-first day of March, two thousand and four, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the United Mexican States and the Government of the United States of America, respectively.

(Signed) SHI Jiuyong,
President.

(Signed) Philippe COUVREUR,
Registrar.

President SHI and Vice-President RANJEVA append declarations to the Judgment of the Court; Judges VERESHCHETIN, PARRA-ARANGUREN and TOMKA and Judge ad hoc SEPÚLVEDA append separate opinions to the Judgment of the Court.

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