No. 06-_____

IN THE

Supreme Court of the United States

JOSÉ ERNESTO MEDELLÍN,

Petitioner,

—v.—

THE STATE OF TEXAS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

In the *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, I.C.J. No. 128 (judgment of Mar. 31, 2004), the International Court of Justice determined that 51 named Mexican nationals, including petitioner, were entitled to receive review and reconsideration of their convictions and sentences through the judicial process in the United States. On February 28, 2005, President George W. Bush determined that the United States would comply with its international obligation to give effect to the judgment by giving those 51 individuals review and reconsideration in the state courts. However, the Texas Court of Criminal Appeals held that the President's determination exceeded his powers, and it refused to give effect to the *Avena* judgment or the President's determination.

This case presents the following questions:

1. Did the President of the United States act within his constitutional and statutory foreign affairs authority when he determined that the states must comply with the United States' treaty obligation to give effect to the *Avena* judgment in the cases of the 51 Mexican nationals named in the judgment?

2. Are state courts bound by the Constitution to honor the undisputed international obligation of the United States, under treaties duly ratified by the President with the advice and consent of the Senate, to give effect to the *Avena* judgment in the cases that the judgment addressed?

PARTIES

All parties to the proceedings are named in the caption of the case.

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PETITION FOR A WRIT OF CERTIORARI

OPINION BELOW

The opinion of the Court of Criminal Appeals of Texas, which is captioned *Ex parte Medellín*, has been designated for publication in S.W.3d, but the volume and page numbers are not yet available. The opinion is available at 2006 WL 3302639 and at 2006 Tex. Crim. App. LEXIS 2236, and it is reproduced beginning at page 1a in the Appendix to this Petition.

JURISDICTION

The final judgment of the Court of Criminal Appeals of Texas, that state's court of last resort in criminal matters, was entered on November 15, 2006. This petition is being filed within 90 days of that judgment. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL, TREATY AND STATUTORY PROVISIONS INVOLVED

This case involves the following provisions, which are reproduced beginning at page 80a in the Appendix:

1. United States Constitution, art. II, § 1, sentence 1; *id.* § 2, cls. 2-3; *id.* § 3;

2. United States Constitution, art. VI, cl. 2;

3. Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, art. I, T.I.A.S. No. 6820, 21 U.S.T. 77, 325 (opened for signature April 24, 1963) (the "Optional Protocol");

4. United Nations Charter, art. 94(1), T.S. No. 993, 59 Stat. 1031, 1051 (opened for signature June 26, 1945) (the "UN Charter");

5. Statute of the International Court of Justice, arts. 36(1), 59-60, T.S. No. 993, 59 Stat. 1031, 1060, 1062-63 (opened for signature June 26, 1945) (the "ICJ Statute");

6. United Nations Participation Act of 1945, §§ 2(a), 3, *codified as amended at* 22 U.S.C. §§ 287(a), 287a;

7. Rev. Stat. § 2001, *codified as amended at* 22 U.S.C. § 1732;

8. Omnibus Diplomatic Security and Antiterrorism Act of 1986, § 103(a)(1)(D), *codified as amended at* 22 U.S.C. § 4802(a)(1)(D); and

9. Texas Code of Criminal Procedure, art. 11.071, § 5(a), (d)-(e).

STATEMENT OF THE CASE

On December 10, 2004, this Court granted petitioner José Ernesto Medellín a writ of certiorari to decide whether, under the Supremacy Clause of the Constitution, courts in the United States must give effect to the United States' treaty obligation to comply with the judgment of the International Court of Justice ("ICJ") in the *Case Concerning Avena and Other Mexican Nationals (Mex.* v. *U.S.*), I.C.J. No. 128 (judgment of Mar. 31, 2004) ("*Avena*") (reproduced at 86a-186a). In *Avena*, the ICJ had held, among other things, that the United States was required to give review and reconsideration to the convictions and sentences of 51 nationals of Mexico, including Mr. Medellín, whose rights under the Vienna Convention on Consular Relations had been violated.

While the case was pending in this Court, the President of the United States acted to ensure that courts in the United States will in fact comply with the United States' international obligation to give effect to the *Avena* judgment in the cases of Mr. Medellín and the other 50 nationals of Mexico named in the judgment. Specifically, the

President determined that the United States would "hav[e] State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision." 187a.

Given the prospect that Mr. Medellín would obtain relief in the state court and the procedural obstacles to reaching the merits of his case on federal habeas corpus, this Court by a 5-4 vote dismissed the writ as improvidently granted. *Medellín v. Dretke*, 544 U.S. 660 (2005) (*per curiam*). At the same time, both the Court and several of the individual justices indicated that review in this Court would remain available should petitioner not receive relief in the Texas courts. *Medellín v. Dretke*, 544 U.S. at 664 & n.1, 666 & n.4 (*per curiam*); *id.* at 668-69 (Ginsburg, J., concurring, joined by Scalia, J.); *id.* at 694 (Breyer, J., dissenting, jointed by Stevens, J.).

The circumstances contemplated by the Court in its earlier decision have now come to pass. On March 24, 2005, Mr. Medellin filed an application for post-conviction relief in the Texas Court of Criminal Appeals. That court set the case for briefing and heard oral argument, at which the United States as *amicus curiae* supported Mr. Medellín's request for relief. On November 15, 2006, however, the Texas court denied relief, expressly holding that the President of the United States has no authority to enforce the undisputed treaty obligation of the United States to abide by the *Avena* judgment in the cases of the Mexican nationals addressed in that judgment. For all the reasons the Court granted certiorari previously, and for additional reasons in light of the President's express determination that the United States must comply with the *Avena* judgment in this case, Mr. Medellín again seeks review in this Court.

A. The *Avena* Judgment

Article 36 of the Vienna Convention on Consular Relations, 21 U.S.T. 77, 596 U.N.T.S. 261 (opened for signature Apr. 24, 1963) ("Vienna Convention"), enables consular officers to protect the rights of nationals who are detained in foreign countries. Among other things, Article 36 requires the competent authorities of the detaining state to notify "without delay" a detained foreign national of his right to request assistance from the consul of his own state and, if the national so requests, to inform the consular post of that national's arrest or detention, also "without delay."

Although the United States has vigorously insisted on strict compliance with Article 36 when Americans have been detained overseas, compliance by state and local officials in the United States itself has ranged from spotty to nonexistent. *See, e.g., Medellín v. Dretke*, 544 U.S. at 674 (O'Connor, J., dissenting) (noting the "vexing problem" of "individual States' (often confessed) noncompliance" with the Vienna Convention, which is "especially worrisome in capital cases"). In early 2003, Mexico brought the *Avena* case against the United States in the ICJ, seeking a remedy for violations of the Vienna Convention rights of 54, eventually 52, individual Mexican nationals—including petitioner Medellín—who were then under sentence of death in the United States.

The ICJ is "the principal judicial organ of the United Nations." UN Charter, art. 92. By ratifying the UN Charter—which is a treaty ratified by over 190 nations, including the United States and Mexico—"[e]ach member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party." UN Charter, art. 94(1). Moreover, all parties to the UN Charter "are *ipso facto* parties to the Statute of the International Court of Justice," UN Charter, art. 93(1), which forms "an integral part of the [UN] Charter," *id.*, art.

92. Indeed, in ratifying the UN Charter, the United States made explicit that it was also ratifying the ICJ Statute. *See* Proclamation of Ratification of UN Charter and ICJ Statute, 59 Stat. 1031, 1031 (1945). Under the terms of the ICJ Statute, judgments in cases submitted to the ICJ are "final and without appeal," ICJ Statute, art. 60, but are binding only "between the parties and in respect to [the] particular case," *id.*, art 59.

The ICJ's jurisdiction in any particular case depends entirely on the consent of the parties. *Id.*, art. 36(1). By ratifying the UN Charter and ICJ Statute, the United States agreed to abide by judgments in any case to which it was a party, but it did not consent to jurisdiction in any particular case. In the *Avena* case, Mexico invoked the Vienna Convention's Optional Protocol, to which both the United States and Mexico were parties. The Optional Protocol provides, in relevant part, that "[d]isputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol." Optional Protocol, art. I.

The United States fully participated in the *Avena* proceedings before the ICJ. After extensive briefing and oral argument, the ICJ rendered a judgment that expressly adjudicated Mr. Medellín's own rights and those of the other Mexican nationals whose cases were before the ICJ. 86a-186a. Specifically, the ICJ held that the United States had breached Article 36(1)(b) of the Vienna Convention in the cases of 51 of the Mexican nationals, including Mr. Medellín, by failing "to inform detained Mexican nationals of their rights under that paragraph" and "to notify the Mexican consular post of the[ir] detention." *Avena*, ¶¶ 106(1)-(2), 153(4) (155a-156a, 183a). In 49 of those cases, including that of Mr. Medellín, the ICJ held that the

United States had also violated its obligations under Article 36(1)(a) "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." *Id.*, ¶¶ 106(3), 153(5)-(6) (156a, 183a-184a). And in 34 cases, including that of Mr. Medellín, the ICJ held that the breaches of Article 36(1)(b) also violated the United States' obligation under Article 36(1)(c) "to enable Mexican consular officers to arrange for legal representation of their nationals." *Id.*, ¶¶ 106(4), 153(4), 153(7) (156a, 183a, 184a).

As to remedies, the ICJ first denied Mexico's request for annulment of the convictions and sentences. *Id.*, ¶ 123 (166a). However, recognizing that Article 36(2) of the Convention requires the laws of the signatory states to give "full effect" to the purposes of the rights accorded by Article 36, the ICJ held that United States courts must provide review and reconsideration of the convictions and sentences of the 51 Mexican nationals as a remedy for the violations of Article 36(1) in their cases. *Id.*, ¶¶ 121-22, 153(9) (165a, 185a). The ICJ specified that, *first*, the required review and reconsideration must take place as part of the "judicial process;" *second*, procedural default doctrines could not bar the required review and reconsideration; *third*, the review and reconsideration must take account of the Article 36 violation on its own terms and not require that it qualify also as a violation of some other procedural or constitutional right; and *finally*, the forum in which the review and reconsideration occurred must be capable of "examin[ing] the facts, and in particular the prejudice and its causes, taking account of the violation of the rights set forth in the Convention." *Id.*, ¶¶ 113-14, 122, 134, 138-39, 140 (160a-161a, 165a, 170a-171a, 173a-174a).

B. Prior Proceedings Involving Mr. Medellín in Texas and Federal Courts

On June 29, 1993, law enforcement authorities arrested Mr. Medellín, 18 years old at the time, in connection with the murders of two young women in Houston, Texas. Mr. Medellín, a Mexican national, told the arresting officers that he was born in Mexico, and informed Harris County Pretrial Services that he was not a United States citizen. Nevertheless, Mr. Medellín was not advised of his article 36 right to seek assistance from the Mexican consul, nor was the Mexican consulate ever notified of his detention. Mr. Medellín was unaware of his right to seek consular assistance at any time either before or during his capital trial.[1]

At his trial, Mr. Medellín was convicted of capital murder and sentenced to death. On direct appeal, by unpublished order dated March 19, 1997, the Texas Court of Criminal Appeals affirmed his conviction and sentence.

On April 29, 1997, Mexican consular authorities learned of Mr. Medellín's detention for the first time when he wrote to them from death row, and they promptly began rendering him assistance. Memorial of Mexico at App. A, ¶ 235, *Avena*, 2004 I.C.J. 128. On March 26, 1998, Mr. Medellín filed a state application for a writ of *habeas corpus* arguing, among other things, that his conviction and sentence should be vacated as a remedy for the violation of his Article 36 rights. The trial court denied relief and, by unpub-

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[1] At the time Mr. Medellín was arrested and tried, Mexican consular officers routinely assisted capital defendants by providing funding for experts and investigators, gathering mitigating evidence, acting as a liaison with Spanish-speaking family members, and most importantly, ensuring that Mexican nationals were represented by competent and experienced defense counsel. *See* Memorial of Mexico at 11-38, *Avena*, 2004 I.C.J. 128; *see also Valdez v. State*, 46 P.3d 703, 710 (Okla. Crim. App. 2002) (finding that Mexico would have provided critical resources in 1989 capital murder trial of Mexican national).

lished order dated September 7, 2001, the Texas Court of Criminal Appeals again affirmed.

On November 28, 2001, Mr. Medellín filed a petition for a writ of *habeas corpus* in the United States District Court for the Southern District of Texas, and on July 18, 2002, an amended petition. Mr. Medellín again raised, among others, an Article 36 claim. On June 26, 2003, the District Court denied his petition, and on May 20, 2004, the Fifth Circuit denied a certificate of appealability.

While Mr. Medellín's case was pending before the Fifth Circuit, the ICJ decided *Avena*. Although the effect of the *Avena* judgment had not been briefed or argued, the Fifth Circuit considered the judgment before following prior Fifth Circuit precedent holding that Article 36 of the Vienna Convention was not judicially enforceable. *Medellín v. Dretke*, 371 F.3d 270 (5th Cir. 2004).

Mr. Medellín petitioned for certiorari on the question of the effect of the *Avena* judgment in the cases of Mexican nationals whose rights the ICJ adjudicated in *Avena*, and this Court granted the petition. *Medellín v. Dretke*, 543 U.S. 1032 (2004).

C. The President's Determination

On February 28, 2005, after this Court granted certiorari and while Mr. Medellín's case was pending before it, President George W. Bush issued a signed, written determination that state courts must provide review and reconsideration to the 51 Mexican nationals named in the *Avena* judgment—including Mr. Medellín—pursuant to the criteria set forth by the ICJ in the *Avena* judgment, notwithstanding any state procedural rules that might otherwise bar review of the claim on the merits. The President declared:

> I have determined, pursuant to the authority vested in me as President by the Constitution and laws of the United States, that the United States will discharge its

> international obligations under the decision of the International Court of Justice in the *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America (Avena)*, 2004 I.C.J. 128 (Mar. 31), by having State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican national addressed in that decision.

187a. The President's determination was issued on the same day that the United States filed its brief as amicus curiae in Mr. Medellín's case, and it was attached as an appendix to that brief. Brief for United States as Amicus Curiae Supporting Respondent, Feb. 28, 2005, at 8a, *Medellín v. Dretke*, 544 U.S. 660 (2005) (No. 04-5928) ("U.S. Fed. Br.").

In its brief in this Court, the United States explained that the President had determined that compliance with the *Avena* judgment "serves to protect the interests of United States citizens abroad, promotes the effective conduct of foreign relations, and underscores the United States' commitment in the international community to the rule of law." U.S. Fed. Br. 9. In particular, the United States observed that "[c]onsular assistance is a vital safeguard for Americans abroad, and the government has determined that, unless the United States fulfills its international obligation to achieve compliance with the ICJ *Avena* decision, its ability to secure such assistance could be adversely affected." *Id.* at 41.

As the United States also explained, the President's determination gave Mr. Medellín the right to "file a petition in state court seeking [the] review and reconsideration [ordered in *Avena*], and the state courts are to recognize the *Avena* decision. In other words, when such an individual applies for relief to a state court with jurisdiction over his case, the Avena decision should be given effect by the state

court in accordance with the President's determination that the decision should be enforced under general principles of comity." *Id.* at 42. In the event that prejudice is found, "a new trial or a new sentencing would be ordered." *Id.* at 47. To the extent that state procedural default rules would prevent giving effect to the President's determination, "those rules must give way, because Executive action that is undertaken pursuant to the President's authority under Article II of the Constitution and authorized by his power to represent the United States in the United Nations, see U.N. Charter Art. 94, constitutes 'the supreme Law of the Land.' " *Id.* at 43-44 (citations omitted). Finally, "a state court would not be free to reexamine whether the ICJ correctly determined the facts or correctly interpreted the Vienna Convention." *Id.* at 46.

D. This Court's Prior Decision

In deference to the President's determination directing claims for review and reconsideration to the state courts, Mr. Medellín filed a motion to stay his case in this Court, requesting that the case be held in abeyance while Mr. Medellín exhausted in state court his claims based on *Avena* and the President's determination—neither of which grounds had existed at the time of his first state post-conviction petition. In order to ensure compliance with any applicable statute of limitations, Mr. Medellín filed the contemplated petition for a writ of habeas corpus in the Texas Court of Criminal Appeals while his case was pending before this Court, and he asked the Texas court to hold his petition in abeyance until this Court had ruled on his motion for a stay.

On May 23, 2005, this Court decided, by a vote of 5 to 4, to dismiss the writ of certiorari as improvidently granted, in part because of the prospect of relief in Texas state court and in part because of potential obstacles to reaching the merits because of the federal habeas issues raised in the

procedural posture of the case as then before the Court. *Medellín v. Dretke*, 544 U.S. 660, 662 (2005) (*per curiam*). The Court specifically noted that direct review after a decision of the Texas Court of Criminal Appeals in Mr. Medellín's case would be a better vehicle for reaching the specific issues presented:

> Of course Medellín, or the State of Texas, can seek certiorari in this Court from the Texas courts' disposition of the state habeas corpus application. In that instance, this Court would in all likelihood have an opportunity to review the Texas courts' treatment of the President's memorandum and the *Case Concerning Avena and Other Mexican Nationals (Mex.* v. *U.S.*), 2004 I.C.J. No. 128 (Judgment of Mar. 31), unencumbered by the issues that arise from the procedural posture of this action.

Id. at 664 n.1.

Justice Ginsburg concurred in the decision and, writing for herself and Justice Scalia, stated that she did so "recognizing that this Court would have jurisdiction to review the final judgment in the Texas proceedings, and at that time, to rule definitively on the Nation's obligation under the judgment of the ICJ if that should prove necessary." *Id.* at 669 (internal quotation marks omitted). Writing for herself only, Justice Ginsburg said she would have preferred to grant Mr. Medellín's motion to stay, *id.* at 668, but given the absence of a majority for that course joined the Court's dismissal, which "would leave nothing pending here, but would enable this Court ultimately to resolve, clearly and cleanly, the controlling effect of the ICJ's *Avena* judgment, shorn of procedural hindrances that pervade the instant [federal] action." *Id.* at 668-69.

Justice O'Connor dissented, joined by Justices Stevens, Souter, and Breyer, stating that rather than dismiss, she would have vacated the Fifth Circuit's denial of a certifi-

cate of appealability and remanded for further proceedings there. *Id.* at 673. Since the rights of 50 individuals apart from *Medellín* were adjudicated in the *Avena* decision, Justice O'Connor noted, "[h]is case . . . presents, and the Court in turn avoids, questions that will inevitably recur." *Id.* at 675.

Justice Souter, writing for himself, and Justice Breyer, writing for himself and Justice Stevens, also wrote dissenting opinions, in which they stated that they would have granted the stay that Mr. Medellín had sought. Justice Souter wrote that a stay "would retain federal jurisdiction and the option to act promptly, which petitioner deserves after litigating this far." *Id.* at 692. Justice Breyer noted that "several Members of this Court have confirmed that the federal questions implicated in this case are important, thereby suggesting that further review here after the Texas courts reach their own decisions may well be appropriate" and "that a loss in state court would likely be followed by a review in this Court." *Id.* at 694.

E. The Proceedings Below

Following this Court's dismissal, the Texas Court of Criminal Appeals set Mr. Medellín's habeas petition for briefing and oral argument on whether Mr. Medellín's habeas corpus application satisfied the requirements of Article 11.071, § 5, of the Texas Code of Criminal Procedure ("Section 5"). *Ex parte Medellín*, 206 S.W.3d 584 (Tex. Crim. App. 2005) (order directing briefing). Section 5 is the Texas provision governing subsequent applications by petitioners who had previously sought post-conviction relief.

Mr. Medellín argued, both in his petition and his brief, that the treaty obligation to abide by the *Avena* decision and the President's determination implementing it on his behalf are each independently binding federal law and that, by virtue of the Supremacy Clause of the United States

Constitution, they preempt any inconsistent provisions of Section 5.[2] Mr. Medellín also argued that, in any case, he satisfied the requirements of Texas law.

The United States, as *amicus curiae*, argued in support of granting Mr. Medellín review and reconsideration of his conviction and sentence on the ground that the President had determined that that action was necessary in order for the United States to comply with its treaty obligations. The United States also argued that federal law would preempt Section 5 in Mr. Medellín's case because application of Section 5 to bar Mr. Medellín's petition would contravene the President's implementation of treaty obligations, authorized by federal statute, as well as his foreign affairs authority under Article II of the United States Constitution. Brief for United States as Amicus Curiae, Sept. 2, 2005, at 49-50 ("U.S. CCA Br.").

On September 14, 2005, the Court of Criminal Appeals heard oral argument from Mr. Medellín, the State of Texas, and the United States. On November 15, 2006, the Court of Criminal Appeals dismissed Mr. Medellín's application, holding that the application did not satisfy Section 5 and

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[2] *See* Subsequent Application for Post-Conviction Writ of Habeas Corpus, Mar. 24, 2005, at 3 ("Subseq. Appl.") ("President Bush's determination and the *Avena* Judgment constitute two separate sources of binding federal law. As discussed below, Texas law expressly permits this Court to give full effect to the President's determination and the *Avena* Judgment. But if Texas law were read to prevent this Court from doing so, it would be preempted."); *see also id.* at 13-24; Brief of Applicant, July 29, 2005 at 1-2 ("Appl't Br.") ("In the event that the Court determines for any reason that those requirements are not met, or that any other provision, rule, or doctrine of Texas law would bar Mr. Medellín from receiving the review and reconsideration that first the ICJ and now the President have ordered, this Court would also have to decide whether Texas courts must in any event give effect to the *Avena* Judgment and the President's Determination, as a matter of federal preemption of state law under the Supremacy Clause of Article VI of the United States Constitution."); *see also id.* at 36-52.

that neither the President's determination nor *Avena* preempts that provision of state law. 1a.

With respect to the President's determination, the Texas court was divided, with no single rationale commanding a majority. Judge Keasler, joined by Judges Meyers, Price, and Hervey, found that the President "exceeded his inherent constitutional foreign affairs authority by directing state courts to comply with *Avena*." 45a. Specifically, Judge Keasler wrote: "We hold that the President has exceeded his constitutional authority by intruding into the independent powers of the judiciary . . . the President cannot dictate to the judiciary what law to apply or how to interpret the applicable law." 30a. Judge Keasler went on to state that "it is evident that the President's independent power to settle a dispute with a foreign nation, recognized throughout the nation's history, depends on the existence of an executive agreement," and that "[g]iven the extraordinary conduct of the President, unsupported by a history of congressional acquiescence, we find that the President's chosen method for resolving this Country's dispute with Mexico is 'incompatible with the . . . implied will of Congress.' " 44a-45a (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (Jackson, J., concurring)). Accordingly, Judge Keasler found, the President's determination constitutes an "unprecedented unilateral action,' " which taken in the absence of an executive agreement, renders "the exercise of the President's foreign affairs power '. . . at its lowest ebb'." *Id.* After considering the statutes and treaties cited by Mr. Medellín and the United States, Judge Keasler concluded that:

> The President's Memorandum . . . cannot be sustained under the express or implied constitutional powers of the President relied on by Medellín and the United States or under any power granted to the President by an act of Congress cited by Medellín and the United States. As such, the President has violated the

> separation of powers doctrine by intruding into the domain of the judiciary, and therefore, Medellín cannot show that the President's memorandum preempts Section 5.

55a.

Judge Womack concurred in the result without opinion. 64a. Presiding Judge Keller delivered an opinion concurring in the judgment, stating that because of the state interests involved, the President's "unprecedented, unnecessary, and intrusive exercise of power over the Texas court system cannot be supported by the foreign policy authority conferred on him by the United States Constitution," 71a, and suggesting that, at a minimum, a new treaty would be required to give effect to the *Avena* judgment, 68a-69a. Judge Cochran, writing for herself and Judges Johnson and Holcomb, found that the President's determination was without effect because it was not written in a "manner prescribed for Presidential Proclamations or Executive Orders," but rather appeared to be "written in a private memo style." 78a-79a.

With respect to the *Avena* judgment, Judge Keasler wrote on behalf of a majority, and held that Mr. Medellín's claim was foreclosed by *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006), which, the Texas court found, interpreted the Vienna Convention in a manner inconsistent with the *Avena* judgment. 20a. The court concluded that "[i]n this case, we are bound by the Supreme Court's determination that ICJ decisions are not binding on United States courts." 24a. The Texas court did not explicitly address whether the *Avena* judgment—whether right or wrong in the view of the U.S. courts—would still be binding in the cases of the 51 Mexican nationals, including Mr. Medellín, whose cases, unlike that of the defendants in *Sanchez-Llamas*, the ICJ adjudicated. Mr. Medellín had expressly argued that the *Avena* judgment was directly binding as a matter of treaty

in his case, as he was one of the Mexican nationals whose rights were adjudicated in that judgment,[3] but the Texas court apparently failed to perceive the difference between his case and the two cases decided in *Sanchez-Llamas.*

Having found that neither the President's determination nor the *Avena* judgment constitutes binding federal law, the Court of Criminal Appeals concluded that they could not preempt Section 5. The court then went on to interpret Section 5 as barring Mr. Medellín's petition, and on that basis, dismissed the petition. 63a-64a.[4]

Mr. Medellín now seeks review in this Court, as contemplated by this Court's prior decision in his case. *See Medellín v. Dretke*, 544 U.S. at 664 n.1.

REASONS FOR GRANTING THE WRIT

In this case, the Texas Court of Criminal Appeals has expressly challenged the authority of the federal govern-

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[3] Subseq. Appl. 22 ("Mr. Medellín was one of the nationals whose rights were adjudicated by the ICJ, so the *Avena* Judgment is a binding adjudication in Mr. Medellín's own case."); *see also id.* at 20-23; Appl't Br. 42 ("[T]he courts of the United States and the several states are obliged to comply with the *Avena* judgment by treating the judgment as conclusive of the rights of Mr. Medellín and the other Mexican nationals whose rights were adjudicated in *Avena*."); *see also id.* at 36, 41-43, 51.

[4] On November 21, 2006, following the decision in the Texas Court of Criminal Appeals and in order to ensure that his claims were preserved under any applicable statute of limitations, Mr. Medellín filed a federal habeas petition in the United States District Court for the Southern District of Texas seeking relief based on the *Avena* judgment and the President's determination. *Medellín v. Quarterman*, No. 4:06cv3688. He simultaneously asked the District Court to hold his petition in abeyance pending this Court's disposition of a petition for certiorari to review the judgment of the Texas Court of Criminal Appeals. By order dated January 8, 2007, that court noted Mr. Medellín's request to hold the case in abeyance, but directed Texas to respond to the petition.

ment, in the person of the President of the United States, to conduct the foreign relations of the United States by determining whether the United States would comply with the decision of an international court in a case to which it was a party. That Court has done so, moreover, in a case in which the President has exercised his foreign affairs authority to determine only that the United States would comply with treaty obligations to which the President, with the advice and consent of the Senate, had earlier committed this country. Hence, if left unreviewed, the Texas court's decision would result in the execution of a foreign national by a process that defied the federal government's paramount authority in the matter of our international relations.

To ensure "uniformity in this country's dealings with foreign nations," it is imperative that state authorities respect the Constitution's allocation of the foreign affairs power to the federal government, and specifically to the President. *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 413 (2003). To ensure the United States' effectiveness in world affairs, it is imperative that the international community understand that when the United States gives its word, as it did in the UN Charter, the ICJ Statute, and the Optional Protocol, the United States will keep its word. Especially in a case involving capital punishment, this Court cannot stand by when the Texas Court of Criminal Appeals tells the world otherwise.

I. The Court Should Grant the Writ Because the Texas Court of Criminal Appeals Has Challenged the President's Constitutional and Statutory Authority to Conduct the Nation's Foreign Affairs.

It is fundamental that the federal government—not the individual states—is responsible for the conduct of this nation's relations with foreign powers. The President, together with his subordinates in the executive branch,

speaks for the United States in these relations. In this case, however, the Texas Court of Criminal Appeals has declared invalid an exercise of the federal foreign affairs power by the President. That decision cannot be allowed to stand unreviewed.

In his February 2005 determination, the President made clear that his determination to "discharge [the] international obligations" of the United States by giving effect to the *Avena* judgment was made "pursuant to the authority vested in me as President by the Constitution and the laws of the United States of America." 187a. As the United States has explained, this determination reflects the President's decision "that the foreign policy interests of the United States in meeting its international obligations and in protecting Americans abroad justify compliance with the ICJ's decision." U.S. CCA Br. 21; *accord* U.S. Fed. Br. 41, 48.

The state court, however, held that the President of the United States had no authority to act in this manner. The plurality opinion by Judge Keasler concluded that, in issuing his determination, "the President has exceeded his constitutional authority by intruding into the independent powers of the judiciary." 30a. The plurality recognized that "[t]he President's independent foreign affairs power to enter into an executive agreement to settle a dispute with a foreign nation under Article II of the Constitution" was well established. 43a. It nonetheless concluded, however, that the President did not have authority to direct compliance with the result of an existing dispute resolution mechanism—even though that mechanism had been established by treaties ratified by the President with the advice and consent of the Senate. 45a. Presiding Judge Keller, concurring, would have gone even further, suggesting that a new treaty would be required before the states must abide by the result of the mechanism set up by the Optional Protocol to the Vienna Convention. 68a.

Notwithstanding the Texas plurality's characterization of the issue as one of "separation of powers," this case squarely presents an issue of federalism—specifically, the paramount authority of the federal government in matters of international relations. As this Court has made clear, "[i]n our dealings with the outside world the United States speaks with one voice and acts as one, unembarrassed by the complications as to domestic issues which are inherent in the distribution of political power between the national government and the individual states." *United States v. Pink*, 315 U.S. 203, 242 (1942).[5] Review of the state court's decision in this case, which refuses to enforce an exercise of federal foreign affairs authority, is necessary to give effect to the constitutional "concern for uniformity in this country's dealings with foreign nations." *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 413 (2003) (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 n.25 (1964)). Allowing the Texas state court to have the last word—or courts of the various states to have several potentially inconsistent last words—on the enforcement of the President's determination that the United States will abide by its treaty obligations would gravely compromise the nation's "capacity . . . to speak . . . with one voice in dealing with other governments." *Id.* at 424 (quoting *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 381 (2000)).

Under the Constitution, it is the President who acts as the voice of the United States in its dealings with foreign governments. By vesting "[t]he executive Power . . . in a

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[5] *See also, e.g., Japan Line, Ltd. v. County of L.A.*, 441 U.S. 434, 448 (1979) ("In international relations and with respect to foreign intercourse and trade the people of the United States act through a single government with unified and adequate national power." (internal quotation omitted)); *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941) ("The Federal Government . . . is entrusted with full and exclusive responsibility for the conduct of affairs with foreign sovereignties.").

President of the United States of America," U.S. CONST. art. II, § 1, and granting the President the power to make treaties and appoint and receive ambassadors and consuls, *id*., §§ 2-3, the Constitution extends to the President, as the "Head of State," authority to act as "the sole organ of the federal government in the field of international relations." *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936). This constitutional power of the President includes the "independent authority" to formulate and execute foreign policy even without authorization by statute or treaty. *Garamendi*, 539 U.S. at 414; *accord Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-36 (1952) (Jackson, J., concurring). Thus, for example, the President has the power to enter into executive agreements with foreign governments requiring no ratification by the Senate or approval by Congress. *United States v. Belmont*, 301 U.S. 324, 331 (1937). His actions carry an even greater presumption of validity when carried out with "express or implied authorization from Congress." *Dames & Moore v. Regan*, 453 U.S. 654, 668 (1981) (citing *Youngstown,* 343 U.S. at 637 n.2 (Jackson, J., concurring)).[6]

The Texas plurality, however, held that the President exceeded his authority by determining that the United States would comply with the *Avena* judgment without seeking a new agreement with Mexico that it would do so. That holding fails to recognize that the United States, by

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[6] *See also, e.g., Garamendi*, 539 U.S. at 414 ("the historical gloss on the 'executive Power' vested in Article II of the Constitution has recognized the President's 'vast share of responsibility for the conduct of our foreign relations' "; "there is executive authority to decide what [foreign relations policy] should be"); *First Nat'l City Bank v. Banco Nacional de Cuba,* 406 U.S. 759, 767 (1972) (plurality opinion) (the President has the "lead role . . . in foreign policy"); *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp*., 333 U.S. 103, 109 (1948) ("The President . . . possesses in his own right certain powers conferred by the Constitution on him as Commander-in-Chief and as the Nation's organ in foreign affairs.").

treaties duly ratified by the President and Senate, has *already* agreed with Mexico that it would abide by the outcome of the ICJ's decisions in cases arising under the Vienna Convention. *See* UN Charter, art. 94(1); ICJ Statute, arts. 59-60; Optional Protocol, art. I. The Texas plurality's view would allow the President to create new obligations under executive agreements, but deny him the authority to give effect to existing international obligations under ratified treaties—which, if anything, have greater constitutional dignity than executive agreements. In effect, the Texas plurality ruled that that the President of the United States must ask Mexico's permission before he may act to ensure the United States' compliance with its international commitments.

For the same reasons, the suggestion in Presiding Judge Keller's concurrence that the President is required to conclude a new treaty with Mexico, with the advice and consent of the Senate, is equally pointless. Again, the President, with the advice and consent of the Senate, has *already* entered into treaties with Mexico committing the United States to comply with the *Avena* judgment. Surely the Constitution is not so dysfunctional as to leave the federal government powerless to execute the obligations that the President and Senate have duly undertaken in the exercise of their constitutional authority. As this Court has held, "[w]ithin the field of its powers, whatever the United States rightfully undertakes, it necessarily has warrant to consummate." *Belmont,* 301 U.S. at 331-32.

Hence, if anything, this is a far easier case than this Court's cases holding state law preempted by an executive agreement. *See, e.g., Garamendi*, 539 U.S. at 416, 420; *Dames & Moore*, 453 U.S. at 686; *Belmont*, 301 U.S. at 330-32. In this case, the United States entered into treaties ratified by the President and Senate—which the Constitution declares to be the "supreme Law of the Land," U.S. CONST. art. VI, cl. 2—and the President has simply deter-

mined that the United States will abide by its obligations under those treaties. If the President's authority in international affairs includes the authority to conclude new agreements without Senate approval, then surely it includes the authority to ensure that the United States complies with existing obligations to foreign nations under treaties already ratified with the advice and consent of the Senate. *See, e.g.,* U.S. CONST. art. II, § 3 (the President "shall take Care that the Laws be faithfully executed").

Moreover, as the United States as *amicus curiae* pointed out before the Texas court, Congress has authorized the President to "use such means . . . as he may think proper" to obtain the release of U.S. citizens detained abroad. 22 U.S.C. § 1732; *see* U.S. CCA Br. 23. As well, Congress has authorized the Secretary of State, an Executive Branch officer under the President's direction, to make provision for the "protection of . . . foreign persons in the United States, as authorized by law." 22 U.S.C. § 4802(a)(1)(D). Congress also has recognized the President's broad control over the United States' relations with organs of the United Nations by empowering him, among other things, to direct the actions of the United States before those bodies. *See* 22 U.S.C. § 287(a), 287a; U.S. CCA Br. 28. The Texas court's decision directly thwarts the actions of the Executive Branch in carrying out these statutory missions. *See, e.g., Garamendi*, 539 U.S. at 420 ("the likelihood that state legislation will produce something more than an incidental effect in conflict with express foreign policy of the National Government" is sufficient for preemption).

Finally, contrary to Judge Cochran's opinion concurring in the judgment, the fact that the President's determination is captioned as a memorandum to the Attorney General does not provide a basis for refusing to give it effect. 78a-79a. The legal effect of a presidential directive depends on its substance, not on the form in which it was issued. *Wolsey v. Chapman*, 101 U.S. 755, 770 (1880). Indeed, in

the foreign policy arena, this Court has not required any particular formalities before state law can be preempted. For example, in *Belmont*, the Court identified a preemptive executive agreement from an exchange of diplomatic correspondence, *see* 310 U.S. at 326, and in *Garamendi*, the Court identified a preemptive foreign policy from executive officials' testimony before congressional committees, *see* 539 U.S. at 421-23 (summarizing the testimony); *id.* at 427 (finding the testimony "more than sufficient to demonstrate that the state Act stands in the way of [the President's] diplomatic objectives" (internal quotation marks omitted)).

In this case, there can be no doubt that the President acted to require compliance with *Avena* in the cases of the 51 Mexican nationals, because he expressly and publicly said that that was what he was doing. 187a. The President addressed his determination to the Attorney General, who is responsible for representing the United States in the courts where the *Avena* judgment would be at issue. That determination constituted federal law, and the Texas Court of Criminal Appeals had a constitutional obligation to give it effect. U.S. CONST. art. VI, cl. 2.

Particularly in a case as closely watched as this one, failure to review the state court's direct challenge to Presidential authority would call into question the very ability of the federal government to make good on the promises the United States makes to its treaty partners. Not only would this place further strain on the relationship between the United States and Mexico, but it also would inevitably impair the credibility and bargaining power of the United States in future diplomatic negotiations with any foreign country. If the President is unable to guarantee that the fifty states will respect the nation's promises in regard to the treatment of foreign nationals in this country, foreign nations will understandably be wary of making promises to the United States in regard to the treatment of American

citizens and companies abroad or, for that matter, on any other subject.

II. The Court Should Grant the Writ Because the Texas Court of Criminal Appeals Has Placed the United States in Breach of Undisputed Treaty Obligations.

The Framers provided for review of treaty questions by "one supreme tribunal" in order to ensure that state courts do not bring the United States into disputes with foreign nations over obligations undertaken by the federal government. THE FEDERALIST No. 22, at 150 (Alexander Hamilton) (Clinton Rossiter ed. 1961). There can be no dispute that, if left uncorrected, the Texas court's decision will place the United States in breach of its international legal obligation to give review and reconsideration to the 51 Mexican nationals whose rights were adjudicated in *Avena*. That prospect alone requires this Court's review.

At the time of the *Avena* case, the United States was a party to the Optional Protocol, which gave the ICJ jurisdiction to adjudicate the case that Mexico brought against the United States over the interpretation and application of the Vienna Convention. The United States appeared before the ICJ and vigorously litigated the case. By the terms of the United Nations Charter—a treaty ratified by the President with the advice and consent of the Senate—the United States "undert[ook] to comply with the decision of the International Court of Justice in any case to which it is a party." UN Charter, art. 94(1); *see also* ICJ Statute, art. 59 ("The decision of the Court has no binding force *except between the parties and in respect of that particular case*") (emphasis added); *id.* art. 60 (ICJ judgments are "final and without appeal"). Indeed, even without these provisions, an agreement between two nations to submit a dispute to an international body for decision necessarily implies an agreement to abide by the result. *La Abra Silver Mining*

Co. v. United States, 175 U.S. 423, 463 (1899); *cf. Smith v. Morse*, 76 U.S. (9 Wall.) 76, 82 (1870). Under international law, this obligation applies to all branches of the United States federal government and to all branches of the government of its constituent states, including the judiciary.[7]

In fact, none of the participants in this case disputes this international obligation of the United States to Mexico. Mr. Medellín has unequivocally called upon the courts of this country to ensure that United States fulfills its treaty obligation to comply with *Avena*. Unsurprisingly, Mexico, too, has insisted that the United States has an obligation to comply with *Avena* and called upon the United States to fulfill it. *See* Br. Amicus Curiae of United Mexican States in Supp. of Jose Ernesto Medellín, July 29, 2005, at 28-29, *Ex parte Medellín*, No. AP-75,207 (Tex. Crim. App. Nov. 15, 2006); *accord* Br. Amicus Curiae of Gov't of United Mexican States in Supp. of Pet'r at 28-29, *Medellín v. Dretke*, 544 U.S. 660 (2005) (No. 04-5928). The State of Texas also acknowledges the obligation of the United States to comply. *See* Respondent's Brief, Feb. 28, 2005, at 34, *Medellín v. Dretke*, 544 U.S. 660. The Texas court did not question the obligation. *See, e.g.,* 12a-13a. And the United

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[7] *See*, *e.g.*, RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 321 cmt. b (1987) (federal state is responsible for failure of constituent units to comply with treaty); ARTICLES ON STATE RESPONSIBILITY, art. 4 (International Law Commission, draft adopted 2001) ("The conduct of any State organ shall be considered an act of that State under international law . . . whatever its character as an organ of the central government or of a territorial unit of the State."); Counter-Memorial of United States of America, Mar. 30, 2001, at 127, in *Loewen Group Inc. v. United States*, ICSID Case No. ARB(AF)/98/3 ("The United States accepts the Tribunal's ruling that conduct of an organ of the State shall be considered as an act of the State under international law, whether the organ be legislative, executive or judicial, whatever position it holds in the organisation of the State.") (internal quotation omitted), *available at* http://www.state.gov/documents/organization/7387.pdf.

States, acting through the President, has concluded both that it has an obligation to comply and that it is in the paramount interest of the country to do so. 187a; U.S. CCA Br. 16; U.S. Fed. Br. 41.

Even in the absence of the President's determination, the treaty obligation to comply with the *Avena* decision would independently bind the state courts, because "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land[.]" U.S. CONST. art. VI, cl. 2. To be sure, some treaties—for example, those calling for the appropriation of money—may call for legislative rather than judicial action. *See* Louis Henkin, FOREIGN AFFAIRS AND THE U.S. CONSTITUTION 203 (1996). However, this Court has held that whenever the provisions of a treaty "prescribe a rule by which the rights of the private citizen or subject may be determined," a federal or state court in the United States must "resort[ ] to the treaty for a rule of decision for the case before it as it would to a statute." *Head Money Cases (Edye v. Robertson)*, 112 U.S. 580, 599 (1884). Here, the treaty obligation to give effect to the *Avena* judgment relates to individual rights in the criminal process, and the state judicial authorities are necessarily the ones who are in a position to give them effect. Hence, the President's determination reinforced an obligation that the Constitution imposed on state courts in any event.

In *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006), this Court disagreed with the interpretation that the ICJ gave to the Vienna Convention in *Avena*. However, the Court did not have before it—and thus had no occasion to consider—the effect of the *Avena* judgment and the President's determination on the cases of the 51 Mexican nationals who were named in that judgment and whose rights were expressly adjudicated there. Like any final judgment or award, the *Avena* judgment is binding on the parties regardless of the underlying merits. *See, e.g., Hilton v.*

Guyot, 159 U.S. 113, 203 (1895) ("[T]he merits of the case should not . . . be tried afresh . . . upon the mere assertion . . . that the judgment was erroneous in law or in fact."). In other words, regardless of whether the *Avena* judgment correctly states principles of law applicable to other foreign nationals' cases under the Vienna Convention, it remains binding by treaty "between the parties and in respect of that particular case." ICJ Statute art. 59.

The fear that the state courts might render ineffectual the federal government's efforts to comply with treaties—and that very experience under the Articles of Confederation—is precisely the reason that the Constitution makes treaties binding on state courts under the Supremacy Clause of Article VI and places them within the federal judicial power in Article III, § 2.[8] As Alexander Hamilton argued in support of the Constitution, "the peace of the whole [nation] ought not to be left at the disposal of a part. The union will undoubtedly be answerable to foreign powers for the conduct of its members." THE FEDERALIST No. 80, at 476 (Alexander Hamilton) (Clinton Rossiter ed. 1961), *quoted in Crosby*, 530 U.S. at 381 n.16. This Court cannot allow the Texas court to violate a commitment made by the elected representatives of the American people as a whole.

III. The Court Should Grant the Writ Because Review Now, in This Case, Is the Only Way to Vindicate the Interests at Stake.

The time to decide the questions presented is now. This Court dismissed certiorari in Mr. Medellín's prior case precisely because of the "multiple hindrances" to reaching the

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[8] *See, e.g., Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 236-37 (1796) (opinion of Chase, J.); *id.* at 276-77 (opinion of Iredell, J.); 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 316 (James Madison) (Max Farrand rev. ed. 1966); David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 Mich. L. Rev. 1075, 1102-49 (2000).

merits of Mr. Medellín's case on federal habeas proceedings rather than on direct review from the state court. *Medellín v. Dretke*, 544 U.S. at 666. The Court noted that it was dismissing the petition "in light of the possibility that the Texas courts will provide Medellín with the review he seeks pursuant to the *Avena* judgment and the President's memorandum, and the potential for review in this Court once the Texas courts have heard and decided Medellín's pending action." *Id.* The Texas Court of Criminal Appeals has heard and decided Mr. Medellín's case, and it has denied him relief. Ten other Mexican nationals whose rights were adjudicated in *Avena* have petitions pending before that Court,[9] and but for intervention by this Court, those petitions would presumably meet the same fate as Mr. Medellín's.

Mr. Medellín now returns to this Court. If this Court were to deny review and Mr. Medellín were to pursue a new federal habeas action, the same obstacles—and perhaps others—could hinder the ability of the federal courts to grant effective relief. The President apparently recognized as much when he indicated that the state courts were the appropriate forum for the review and reconsideration that the *Avena* judgment requires. 187a. In accordance with the Court's reasoning in dismissing the earlier writ, it should hear Mr. Medellín's case now.

Nor is there any reason to wait for courts from other states to decide the issue. Both the treaty obligation to abide by the *Avena* judgment and the Presidential deter-

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[9] *Ex parte Cesar Roberto Fierro*, No. WR-17,425-05; *Ex parte Ignacio Gomez*, No. WR-52,166-02; *Ex parte Ramiro Rubi Ibarra*, No. WR-48,832-03; *Ex parte Humberto Leal Garcia*, No. WR-41,743-02; *Ex parte Virgilio Maldonado*, No. WR-51,612-03; *Ex parte Roberto Moreno Ramos*, No. WR-35,938-02; *Ex parte Daniel Angel Plata*, No. WR-46,749-03; *Ex parte Ruben Ramírez Cardenas*, No. WR-48,728-02; *Ex parte Felix Rocha Diaz*, No. WR-52,515-03; *Ex parte Edgar Tamayo*, No. WR-55,690-03.

mination to comply with that obligation constitute federal law, and every state court in the United States has a constitutional obligation to give them effect. To treat some of the 51 Mexican nationals covered in *Avena* differently based on the states in which their cases arose would not only be fundamentally inhumane in capital cases, but it would directly undermine the treatymaking authority of the President and Senate and the ability of the President to speak for the country in matters of international relations.

In any event, the decision of the Texas court already conflicts with the decision of the Oklahoma Court of Criminal Appeals in *Torres v. State*, 2005 OK CR 17, 120 P.3d 1184 (Okla. Crim. App. 2005). In *Torres*, even before the President's determination, the Oklahoma court granted review and reconsideration, consistent with the *Avena* judgment, of the conviction and sentence of one of the 51 Mexican nationals named therein. *See id.* ¶ 7, 120 P.3d at 1187-88. The Texas court held that no such review was required even in the face of the President's determination that the United States would comply with *Avena*. Thus, this case represents a conflict on a question of federal law between the courts of last resort of two states.

While the death penalty itself is not at issue in this case, the status of this case as a capital case makes the need to grant the writ all the more compelling. If there is any case in which this Court should not send a message to friends and allies that the United States is indifferent to its treaty commitments, it is this one, in which the Court would send at the same time a message that the United States is indifferent to human life.

CONCLUSION

For all these reasons, this Court should grant a writ of certiorari.

Respectfully submitted,

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January 16, 2007

APPENDIX

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COURT OF CRIMINAL APPEALS OF TEXAS

No. AP-75207
November 15, 2006

EX PARTE JOSÉ ERNESTO MEDELLÍN,

Applicant.

OPINION

KEASLER, J., delivered the opinion of the Court with respect to Parts I, II, III.A., III.C., and IV, in which KELLER, P.J., MEYERS, PRICE, JOHNSON, HERVEY, HOLCOMB, and COCHRAN, JJ., joined, and an opinion with respect to Part III.B., in which MEYERS, PRICE, and HERVEY, JJ., joined.

José Ernesto Medellín filed this subsequent application, alleging that the International Court of Justice *Avena* decision and the President's memorandum directing state courts to give effect to *Avena,* require this Court to reconsider his Article 36 Vienna Convention claim because they (1) constitute binding federal law that preempt Section 5, Article 11.071 and (2) were previously unavailable factual and legal bases under Section 5(a)(1). We hold that *Avena* and the President's memorandum do not preempt Section 5 and do not qualify as previously unavailable factual or legal bases.

I. PROCEDURAL HISTORY OF MEDELLÍN'S CASE

Medellín, a Mexican national, was convicted of capital murder and sentenced to death for his participation in the gang rape and murder of two teenage girls in Houston. We affirmed his conviction and sentence on direct appeal.[1]

Medellín filed an initial application for a writ of habeas corpus, claiming for the first time, among other things, that his rights under Article 36 of the Vienna Convention had been violated because he had not been advised of his right to contact the Mexican consular official after he was arrested.[2] The district court found that Medellín failed to object to the violation of his Vienna Convention rights at trial and, as a result, concluded that his claim was procedurally barred from review. The court also found, in the alternative, that Medellín, as a private individual, did not have standing to bring a claim under the Vienna Convention because it is a treaty among nations and therefore does not confer enforceable rights on individuals; only signatory nations have standing to raise a claim under the treaty. Offering an additional alternative, the court determined that Medellín failed to show harm because he received effective legal representation and his constitutional rights had been safeguarded. Finally, the court concluded that Medellín did not prove that his rights under the Fifth, Sixth, and Fourteenth Amendments had been violated and that he failed to show that any non-notification affected the validity of his conviction and sentence. We adopted the

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[1] *Medellín v. State,* No. AP-71,997, slip op. (Tex.Crim.App. Mar. 19, 1997) (not designated for publication).

[2] *Ex parte Medellín,* No. 675430-A (339th Dist.Ct. Jan. 22, 2001).

trial court's findings of fact and conclusions of law with written order and denied relief.[3]

Medellín then presented his Vienna Convention claim in a federal petition for a writ of habeas corpus. The district court denied relief,[4] and Medellín filed for a certificate of appealability. While his application was pending, the International Court of Justice (ICJ) issued its decision in *Avena.*[5] In that case, Mexico claimed that the United States had violated the Vienna Convention by failing to timely advise more than fifty Mexican nationals awaiting execution in United States prisons, including Medellín, of their right to talk to a consular official after they had been detained.[6] The ICJ ruled in favor of Mexico, holding that the Vienna Convention does confer individual rights and that the United States violated the Convention.[7] To remedy the violation, the ICJ ordered the United States to provide review and reconsideration of the convictions and sentences[8] at issue to determine whether the violation "caused actual prejudice to the defendant in the process of administration of criminal justice."[9] The ICJ specifically stated that review is required regardless of procedural default rules that would otherwise bar review.[10]

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[3] *Ex parte Medellín,* No. WR-50,191-01 (Tex.Crim.App. Oct. 3, 2001) (not designated for publication).

[4] *Medellín v. Cockrell,* Civ. No. H-01-4078 (S.D.Tex. Apr. 17, 2003).

[5] *Case Concerning Avena and other Mexican Nationals (Mex.v.U.S.),* 2004 I.C.J. No. 128 (Judgment of Mar. 31).

[6] *Id.* ¶¶ 13-16, 49.

[7] *Id.* ¶¶ 90, 106, 140.

[8] *Id.* ¶¶ 138-40.

[9] *Id.* ¶ 121.

[10] *Id.* ¶¶ 112-13, 153(9), (11).

The federal district court denied Medellín's application for a certificate of appealability, and Medellín appealed to the United States Court of Appeals for the Fifth Circuit, which also denied his application.[11] The Fifth Circuit noted the ICJ decision in *Avena,* but determined that it was bound by the Supreme Court's decision in *Breard v. Greene,* which held that claims based on a violation of the Vienna Convention are subject to procedural default rules.[12] Continuing, the court found that even if Medellín's Vienna Convention claim was not procedurally defaulted, its previous holding in *United States v. Jimenez-Nava*—that the Vienna Convention does not create individually enforceable rights—would require it to deny Medellín's application for a certificate of appealability.[13]

Medellín petitioned for certiorari to the Supreme Court of the United States, which granted review.[14] Before oral argument, the President issued a memorandum directing state courts to give effect to the *Avena* decision under the principles of comity.[15] Then, while his case was pending before the Supreme Court, Medellín filed an application for a writ of habeas corpus in this

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[11] *Medellín v. Dretke,* 371 F.3d 270, 273, 281 (5th Cir.2004).

[12] *Id.* at 280 (citing *Breard v. Greene,* 523 U.S. 371, 118 S.Ct. 1352, 140 L.Ed.2d 529 (1998)).

[13] *Id.* (citing *United States v. Jimenez-Nava,* 243 F.3d 192, 198 (5th Cir.2001)).

[14] *Medellín v. Dretke,* 543 U.S. 1032, 125 S.Ct. 686, 160 L.Ed.2d 518 (2004).

[15] President's Memorandum for the Attorney General, Subject: Compliance with the Decision of the International Court of Justice in *Avena* (Feb. 28, 2005), *available at* http://www.whitehouse. gov/news/releases/2005/02/20050228-18.html [hereinafter Presidential Memorandum].

Court, requesting that we give full effect to the *Avena* decision and to the President's memorandum.[16] The Supreme Court subsequently dismissed Medellín's case as improvidently granted, stating that there is a possibility that "Texas courts will provide Medellin with the review he seeks pursuant to the *Avena* judgment and the President's memorandum. . . ."[17]

Based on the Supreme Court's dismissal, we determined that Medellín's subsequent application is ripe for consideration.[18] We therefore filed and set this case for submission.

Under Article 11.071, Section 5(a) of the Code of Criminal Procedure, we may not consider the merits of any claims raised on a subsequent application for a writ of habeas corpus or grant relief unless the applicant provides sufficient specific facts demonstrating that:

- "the current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application . . . because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application";[19]
- "by a preponderance of the evidence, but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt";[20] or

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16 *Ex parte Medellín,* Application No. AP-75,207.

17 *Medellín v. Dretke,* 544 U.S. 660, 125 S.Ct. 2088, 2092, 161 L.Ed.2d 982 (2005) (per curiam).

18 *Ex parte Medellín,* No. AP-75,207 (per curiam order) (designated for publication).

19 Tex.Code Crim. Proc. art. 11.071 § 5(a)(1) (Vernon 2003).

20 *Id.* § 5(a)(2).

- "by clear and convincing evidence, but for a violation of the United States Constitution no rational juror would have answered in the State's favor one or more of the special issues. . . ."[21]

We ordered Medellín and the State to brief the following issue: whether Medellín "meets the requirements for consideration of a subsequent application for writ of habeas corpus under the provisions of Article 11.071, section 5, of the Texas Code of Criminal Procedure."[22] We also invited the Attorney General of the United States to "present the views of the United States."[23] On September 14, 2005, we heard oral argument from the parties and the Solicitor General, who argued on behalf of the Attorney General of the United States. Medellín's claims raise many remarkable issues of first impression for this Court to resolve. Before we provide some necessary background information, we begin with a brief overview of the arguments advanced by the parties and the United States as *amicus curiae*.

Medellín argues that the *Avena* decision and the President's memorandum are binding federal law that preempt Section 5 under the Supremacy Clause of the United States Constitution.[24] Alternatively, contending that he meets the requirements of Section 5(a)(1), Medellín claims that the *Avena* decision and the President's memorandum are previously unavailable factual and legal bases because neither was available when he filed his

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21 *Id.* § 5(a)(3).

22 *Ex parte Medellín,* No. AP-75,207 (per curiam order) (designated for publication).

23 *Id.; see* 28 C.F.R. § 0.5 (2005).

24 Br. of Applicant at 26-27.

first application.[25] Countering Medellín's arguments, the State contends that the *Avena* decision and the President's memorandum do not meet the requirements of Section 5 and do not override it.[26] Finally, the United States as *amicus curiae* asserts that, although *Avena* is not enforceable in United States courts, Medellín is entitled to review and reconsideration of the merits of his Vienna Convention claim "to the extent that his claim relies on the President's determination that 'review and reconsideration' . . . by Texas courts is necessary for compliance with the United States' international obligations."[27] The United States also avers that "Section 5 would contravene the President's implementation of treaty obligations, and federal law would preempt its operation in the circumstances of this case."[28]

II. CONTEXTUAL BACKGROUND

A. Treaties

Treaties are compacts between sovereign nations.[29] In the international arena, compliance with a treaty depends

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[25] *Id.* at 52-53.

[26] Br. of Respondent at 20-21.

[27] Br. of United States as *Amicus Curiae* at 12.

[28] *Id.* at 15.

[29] *United States v. Curtiss-Wright Export Corp.,* 299 U.S. 304, 318, 57 S.Ct. 216, 81 L.Ed. 255 (1936) ("operations of the nation in such [foreign] territory must be governed by treaties, international understandings and compacts, and the principles of international law."); *Santovincenzo v. Egan,* 284 U.S. 30, 40, 52 S.Ct. 81, 76 L.Ed. 151 (1931); *B. Altman & Co. v. United States,* 224 U.S. 583, 600, 32 S.Ct. 593, 56 L.Ed. 894 (1912); *Head Money Cases* (*Edye v. Robertson*), 112 U.S. 580, 598, 5 S.Ct. 247, 28 L.Ed. 798 (1884); *Rocha v. State,* 16 S.W.3d 1, 15-16 (Tex.Crim.App.2000).

upon "the interest and the honor" of the treaty's member nations.[30] When a member nation violates a treaty, another member nation cannot obtain redress from the judicial body of the violating nation but may seek enforcement through "international negotiations and reclamations."[31]

Treaties, entered into by the President of the United States with the consent of a super-majority of the United States Senate,[32] are incorporated into the domestic law of our country pursuant to the Supremacy Clause of the United States Constitution, which commands: "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any

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[30] *Head Money Cases,* 112 U.S. at 598.

[31] *Id.; see also Whitney v. Robertson,* 124 U.S. 190, 194, 8 S.Ct. 456, 31 L.Ed. 386 (1888) ("If the country with which the treaty is made is dissatisfied with the action of the legislative department, it may present its complaint to the executive head of the government, and take such other measures as it may deem essential for the protection of its interests. The courts can afford no redress."); *Baldwin v. Franks,* 120 U.S. 678, 702-03 (1887) (Field, J., dissenting) (when a treaty between the United States and another county is considered as a compact between nations, as opposed to the law of the land, a violation of the treaty is a matter "to be settled by negotiation between the executive departments of the two governments, each government being at liberty to take such measures for redress as it may deem advisable."); *Foster v. Neilson,* 27 U.S. 253, 307, 2 Pet. 253, 7 L.Ed. 415 (1829) ("The judiciary is not that department of the government, to which the assertion of its interests against foreign powers is confided; and its duty commonly is to decide upon individual rights, according to those principles which the political departments of the nation have established.").

[32] U.S. Const. art. II, § 2, cl. 2; *see also B. Altman & Co.,* 224 U.S. at 600; *De Lima v. Bidwell,* 182 U.S. 1, 194, 21 S.Ct. 743, 45 L.Ed. 1041 (1901).

State to the Contrary notwithstanding."[33] Treaties are "placed on the same footing" as legislation enacted by the United States Congress, and while neither is superior to the other,[34] both are subject to the United States Constitution.[35] In describing the relationship between treaties and acts of Congress, the Supreme Court explained the difference between treaties that do not contain self-executing provisions and those that do:

> When the stipulations are not self-executing they can only be enforced pursuant to legislation to carry them into effect, and such legislation is as much subject to modification and repeal by Congress as legislation upon any other subject. If the treaty contains stipulations which are self-executing, that is, require no legislation to make them operative, to that extent they have the force and effect of a legislative enactment. Congress may modify such provisions, so far as they bind the United States, or supersede them altogether.[36]

When a self-executing treaty and an act of Congress concern the same subject matter, courts should give effect to both unless the language of one would be vio-

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[33] U.S. Const. art. VI, cl. 2; *see also Head Money Cases,* 112 U.S. at 598.

[34] *Whitney,* 124 U.S. at 194.

[35] *Reid v. Covert,* 354 U.S. 1, 17, 77 S.Ct. 1222, 1 L.Ed.2d 1148 (1957) (plurality opinion); *Geofroy v. Riggs,* 133 U.S. 258, 267, 10 S.Ct. 295, 33 L.Ed. 642 (1890); *Cherokee Tobacco,* 11 Wall. 616, 78 U.S. 616, 620, 20 L.Ed. 227 (1871) ("a treaty cannot change the Constitution or be held valid if it be in violation of that instrument."); *Rocha,* 16 S.W.3d at n. 12.

[36] *Whitney,* 124 U.S. at 194; *see also Sanchez-Llamas v. Oregon,* 126 S.Ct. 2680 (2006); *Head Money Cases,* 112 U.S. at 599.

lated.[37] But when "the two are inconsistent, the one last in date will control the other."[38]

Addressing the relationship between state law and treaties, the Supreme Court has stated: "[T]reaties with foreign nations will be carefully construed so as not to derogate from the authority and jurisdiction of the States of this nation unless clearly necessary to effectuate the national policy."[39] Accordingly, "state law must yield when it is inconsistent with, or impairs the policy or provisions of, a treaty or of an international compact or agreement."[40]

The Supreme Court has recognized that a treaty may contain certain provisions that grant judicially enforceable rights to a foreign national residing in another country.[41] In such cases, under the Supremacy Clause, the provisions of the treaty are placed in the "same category as other laws of Congress" and therefore, are "subject to such acts as Congress may pass for its enforcement, modification, or repeal."[42] When a treaty confers rights that are judicially enforceable, a court will look "to the treaty for a rule of decision for the case before it as it would to a statute."[43] However, as we recently noted, there is a presumption that " 'international agreements, even those directly benefitting private persons, generally do not create private rights or provide for a private cause

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37 *Whitney,* 124 U.S. at 194.

38 *Id.*

39 *United States v. Pink,* 315 U.S. 203, 230, 62 S.Ct. 552, 86 L.Ed. 796 (1942).

40 *Id.* at 230-31.

41 *Head Money Cases,* 112 U.S. at 598.

42 *Id.* at 599.

43 *Id.*

of action in domestic courts.' "[44] Numerous federal circuit courts of appeals have also acknowledged this presumption, finding that treaty rights belong to the member nations only,[45] and therefore, may be enforced only through international political and diplomatic channels.

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[44] *Sorto v. State,* 173 S.W.3d 469, 478 (Tex.Crim.App.2005) (quoting Restatement (Third) of Foreign Relations Law of the United States § 907 *cmt. a,* at 395 (1987) and citing *Hamdan v. Rumsfeld,* 415 F.3d 33, 38-40 (D.C.Cir.2005), *overruled on other grounds by* ___ U.S. ___, 126 S.Ct. 2749, 165 L.Ed.2d 723 (2006)); *see also Hinojosa v. State,* 4 S.W.3d 240, 252 (Tex.Crim.App.1999) ("Generally, individuals do not have standing to bring suit based on an international treaty when sovereign nations are not involved in the dispute.").

[45] *Sorto,* 173 S.W.3d at 478 n. 31 (citing *United States v. Jimenez-Nava,* 243 F.3d 192, 195 (5th Cir.2001); *United States v. Li,* 206 F.3d 56, 67 (1st Cir.2000) (Selya & Boudin, JJ., concurring); *United States ex. rel. Lujan v. Gengler,* 510 F.2d 62, 67 (2d Cir.1975); *United States v. Rosenthal,* 793 F.2d 1214, 1232 (11th Cir.1986)); *see also United States v. Emuegbunam,* 268 F.3d 377, 389 (6th Cir.2001) ("courts presume that the rights created by an international treaty belong to a state and that a private individual cannot enforce them."); *United States ex rel. Saroop v. Garcia,* 109 F.3d 165, 167 (3d Cir.1997) ("Because treaties are agreements between nations, individuals ordinarily may not challenge treaty interpretations in the absence of an express provision within the treaty or an action brought by a signatory nation."); *Goldstar (Panama) S.A. v. United States,* 967 F.2d 965, 968 (4th Cir.1992) ("International treaties are not presumed to create rights that are privately enforceable."); *Matta-Ballesteros v. Henman,* 896 F.2d 255, 259 (7th Cir.1990) ("It is well established that individuals have no standing to challenge violations of international treaties in the absence of a protest by the sovereigns involved."). *But see Sanchez-Llamas,* 126 S.Ct. at 2697 (Breyer, J., dissenting) (stating "no such presumption exists.").

B. The United Nations Charter and the Statute of the International Court of Justice

The United Nations was formed when its Charter, drafted in San Francisco at the United Nations Conference on International Organization, was ratified by the United States, the Republic of China, France, the Union of Soviet Socialist Republics, Great Britain, Northern Ireland, and a majority of other signatory nations.[46] With respect to the United States, the Charter entered into force on October 24, 1945. Article 92 establishes the ICJ as "the principal judicial organ of the United Nations."[47] The ICJ operates "in accordance with the annexed Statute [of the ICJ]. . . ."[48] Under Article 93, "All Members of the United Nations are *ipso facto* parties to the Statute of the International Court of Justice."[49] The Statute of the ICJ establishes, among other things, the court's organization, competence (which includes its jurisdiction), and procedures.[50] Article 34 of the Statute provides that "[o]nly states may be parties in cases before the [ICJ]" and, under Article 36(1), the court has jurisdiction over "cases which the parties refer to it and all matters specifically provided for . . . in treaties and conventions in force."[51] Under Article 59, an ICJ deci-

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[46] U.N. Charter introductory note, art. 110, para. 3, 59 Stat. 1031; *see also* Basic Facts about the United Nations, The United Nations: Organization, *available at* http://www.un.org/aboutun/basicfacts/unorg.htm; Charles Patterson, The Oxford 50th Anniversary Book of the United Nations 7-21 (Oxford University Press) (1995).

[47] U.N. Charter art. 92.

[48] *Id.*

[49] *Id.* art. 93, para. 1.

[50] Statute of the International Court of Justice arts. 2-64, June 26, 1945, 59 Stat. 1031 [hereinafter Statute of the ICJ].

[51] *Id.* art. 36(1).

sion binds only the parties to that particular case.[52] Article 94 of the United Nations Charter states that each member "undertakes to comply with the decision of the International Court of Justice in any case to which it is a party."[53] If a party fails to comply with the ICJ's decision, "the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment."[54]

C. The Vienna Convention on Consular Relations and the Optional Protocol Concerning the Compulsory Settlement of Disputes

The Vienna Convention on Consular Relations was adopted by the United Nations Conference on Diplomatic Intercourse and Immunities on April 24, 1963.[55] The Vienna Convention is a seventy-nine article multilateral treaty that "promotes the effective delivery of consular services in foreign countries, including access to consular assistance when a citizen of one country is arrested, committed to prison or custody pending trial, or detained in any other manner in another country."[56] Mexico, one of the first countries to deposit its ratification with the United Nations Secretary-General after the Con-

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52 *Id.* art. 59.

53 U.N. Charter art. 94, para. 1.

54 *Id.* art. 94, para. 2.

55 Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S .T. 77, 596 U.N.T.S. 261 (ratified by the United States on Nov. 24, 1969) [hereinafter Vienna Convention].

56 *Sorto,* 173 S.W.3d at 477; *see also Sanchez-Llamas,* 126 S.Ct. at 2674 ("The Convention consists of 79 articles regulating various aspects of consular activities.").

vention opened for signatures on April 18, 1961, became bound by Convention on March 19, 1967.[57] With the advice and consent of the Senate, the President ratified the Convention, which became binding on the United States on December 24, 1969.[58]

Article 36 "ensure[s] that no signatory nation denies consular access and assistance to another country's citizens traveling or residing in a foreign country. . . ."[59] Article 36 reads as follows:

> 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

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57 Vienna Convention.

58 *Id.; United States v. Lombera-Camorlinga,* 206 F.3d 882, 884 (9th Cir.2000); *see also* Tenagne Tadesse, *The Breard Aftermath: Is the U.S. Listening?,* 8 Sw. J.L. & Trade Am. 423, 429-30 (2002) (discussing the history of the Vienna Convention).

59 *Sorto,* 173 S.W.3d at 477.

> the said authorities without 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.[60]

In addition to becoming signatories to the Vienna Convention, Mexico and the United States became parties to the Optional Protocol Concerning the Compulsory Settlement of Disputes. Article I of the Optional Protocol states: "Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a

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[60] Vienna Convention, art. 36.

Party to the present Protocol."[61] Although the United States recently withdrew from the Optional Protocol, the United States has agreed to "discharge its inter-national obligations under the decision . . . by having State courts give effect to the [*Avena*] decision. . . ."[62]

D. International Court of Justice Rulings on Article 36 of the Vienna Convention Involving the United States

The ICJ has encountered a series of cases filed against the United States by other nations alleging violations of Article 36 of the Vienna Convention. Paraguay filed the first case on behalf of its citizen, Angel Francisco Breard.[63] The ICJ issued an order, at Paraguay's request, requesting the United States to stay Breard's execution until it could render a decision.[64] Based on that order, Breard filed an original petition for a writ of habeas cor-

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[61] Optional Protocol Concerning the Compulsory Settlement of Disputes, Apr. 18, 1961, Art. I, 21 U.S.T. 326, T.I.A.S. No. 6820 [hereinafter Optional Protocol].

[62] Presidential Memorandum; *Medellín,* 125 S.Ct. at 2101 (O'Connor J., dissenting); Letter from Alberto Gonzales, U.S. Attorney General, to Greg Abbott, Texas Attorney General (Apr. 5, 2005); United States Department of State, Daily Press Briefing, Mar. 10, 2005, Adam Ereli, Deputy Spokesman, *available at* http://www.state.gov/r/pa/prs/dpb/2005/43225.htm (stating "in recognition of the optional protocol and our international commitments, the President has determined that the United States will comply with the judgment of the International Court of Justice and that we will review—our state courts will review—the cases that ICJ responded to.").

[63] *Case Concerning the Vienna Convention on Consular Relations (Para.v.U.S.),* Application of the Republic of Paraguay, Apr. 3, 1998; *see also Breard,* 523 U.S. at 374.

[64] *Breard,* 523 U.S. at 374.

pus and an application to stay his execution in the Supreme Court of the United States.[65] The Supreme Court found that Breard's claim was procedurally defaulted and denied his petition and application; Breard was later executed.[66] Paraguay then requested that the ICJ discontinue the proceedings with prejudice; thus, the ICJ did not issue a decision regarding Breard.[67]

Subsequently, two more suits were filed, *Federal Republic of Germany v. United States of America (LaGrand)*[68] and *Mexico v. United States of America (Avena).*[69] In *LaGrand,* Germany initiated proceedings in the ICJ on behalf of two of its citizens, brothers Karl and Walter LaGrand, who had been convicted of murder and sentenced to death in Arizona.[70] Germany alleged that the United States violated Article 36 of the Vienna Convention by failing to inform the LaGrands of their right to contact a German consular official.[71] Although both the LaGrands were executed before the ICJ issued its judgment, the ICJ still found, among other things, that: (1) Article 36 of the Vienna Convention confers individual rights on detained foreign nationals; (2) the United States failed to comply with Article 36; and (3) as applied to the LaGrands, the procedural default rules of the United States prevented the rights intended under Article 36 from being given

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65 *Id.*

66 *Id.* at 375-76, 378.

67 *Case Concerning the Vienna Convention on Consular Relations (Para.v.U.S.),* Order of 10 November 1998-Discontinuance.

68 2001 I.C.J. 104 (June 27, 2001).

69 2004 I.C.J. 128 (Mar. 31, 2004).

70 *LaGrand,* 2001 I.C.J. 104, ¶¶ 1, 10, 14.

71 *Id.* ¶¶ 1, 38.

full effect.[72] The court further stated that the United States, "by means of its own choosing, shall allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in that Convention."[73]

Almost three years after *LaGrand,* the ICJ handed down its decision in *Avena.* With regard to Medellín and fifty other Mexican nationals, the ICJ concluded that the United States breached its obligations under Article 36, paragraph 1(b) by failing to inform them, after their arrests and without delay, of their right to contact the Mexican consular post.[74] And in forty-nine cases, including Medellín's case, the court found that the United States violated Article 36, paragraphs 1(a) through (c) by failing to: (1) notify the consular post of their detention; (2) enable consular officials to communicate with and have access to them; and (3) enable consular officials to visit with them.[75] The court also found that in Medellín's case, in addition to thirty-three others, the United States violated Article 36, paragraph (c) by preventing consular officials from being able to timely arrange for their citizens' legal representation.[76]

After addressing the United States' and Mexico's arguments concerning the appropriate remedy for the Article 36 violations, the court concluded "that the 'review and reconsideration' prescribed by it in the *LaGrand* case should be effective."[77] Directing the

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72 *LaGrand,* 2001 I.C.J. 104, ¶¶ 77, 90-91, 125.

73 *Id.* ¶ 128(7).

74 *Avena,* ¶¶ 106(1), 153(4).

75 *Id.* ¶¶ 106(2)-(3), 153(5)-(6).

76 *Id.* ¶¶ 106(4), 153(7).

77 *Id.* ¶ 138.

United States to provide review and reconsideration of the convictions and sentences of the Mexican nationals whose individual rights under the Vienna Convention had been violated,[78] the ICJ stated:

> 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.[79]

E. The Presidential Memorandum

After the United States Supreme Court granted certiorari in this case, the President weighed in on the controversy surrounding *Avena* by issuing a memorandum to the United States Attorney General, which states, in pertinent part, as follows:

> I have determined, pursuant to the authority vested in me as President by the Constitution and the laws of the United States of America, that the United States will discharge its inter-national obligations under the decision of the International Court of Justice in . . . [*Avena*], by having State courts give effect to the decision in accordance with gen-

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78 *Id.* ¶¶ 138, 140-41.

79 *Id.* ¶ 139.

eral principles of comity in cases filed by the 51 Mexican nationals addressed in that decision.[80]

III. ANALYSIS

A. *Avena* and The Supremacy Clause

Medellín claims that the ICJ decision in *Avena* is binding federal law that preempts Section 5 of the Texas Code of Criminal Procedure. The State and the United States as *amicus curiae* disagree.

As an initial matter, while we recognize the competing arguments before us concerning whether Article 36 confers privately enforceable rights, a resolution to that issue is not required for our determination of whether *Avena* is enforceable in this Court. Our decision is controlled by the Supreme Court's recent opinion in *Sanchez-Llamas v. Oregon,* and accordingly, we hold that *Avena* is not binding federal law and therefore does not preempt Section 5.

While Medellín's case was pending before us, the Supreme Court granted certiorari in *Sanchez-Llamas v. Oregon*[81] and *Bustillo v. Johnson,*[82] consolidating the two cases to consider: "(1) whether Article 36 of the Vienna Convention grants rights that may be invoked by individuals in a judicial proceeding; (2) whether suppression of evidence is a proper remedy for a violation of Article 36; and (3) whether an Article 36 claim may be deemed forfeited under state procedural rules because a defendant failed to raise the claim at trial."[83] The Court issued

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80 Presidential Memorandum.

81 126 S.Ct. 620 (2005).

82 126 S.Ct. 621 (2005).

83 *Sanchez-Llamas,* 126 S.Ct. at 2677.

its decision in these cases during the last week of its 2005 term.[84] Although the Court found it unnecessary to decide whether Article 36 grants privately enforceable rights,[85] the Court held that the exclusionary rule is not a remedy for violations of Article 36[86] and reaffirmed its holding in *Breard,* stating "We . . . conclude, as we did in *Breard,* that claims under Article 36 of the Vienna Convention may be subjected to the same procedural default rules that apply generally to other federal-law claims."[87]

When addressing petitioner Bustillo's argument that the Court should revisit its decision in *Breard* in light of the ICJ's decisions in *LaGrand* and *Avena,* the Court concluded that ICJ decisions are entitled only to " 'respectful consideration.' "[88] In support of this determination, the Court cited its constitutionally mandated position as the absolute authority in defining a treaty's meaning as federal law[89] and stated that "[i]t is against this background that the United States ratified, and the Senate gave its advice and consent to, the various agreements that govern referral of Vienna Convention disputes to the ICJ."[90] Looking at those agreements, the Court determined that "[n]othing in the structure or purpose of the ICJ suggests that its interpretations were intended to be conclusive on our courts."[91] The Court

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84 *Id.*

85 *Id.*

86 *Id.* at 2682.

87 *Id.* at 2687.

88 *Id.* at 2683, 2685 (quoting *Breard,* 523 U.S. at 375).

89 *Id.* at 2684.

90 *Id.*

91 *Id.*

noted that under Article 59 of the Statute of the ICJ, an ICJ decision binds only the parties to that case and, as a result, not even the ICJ is bound by its prior decisions.[92] Reviewing Articles 59 and 34 of the Statute, the Court also considered that the "principle purpose [of the ICJ] is to arbitrate particular disputes between national governments."[93] Finally, the Court pointed out that Article 94(2) of the United Nations Charter "contemplates quintessentially *international* remedies" because an aggrieved nation may seek recourse from the Security Council when another nation fails to comply with an ICJ decision.[94] According " 'great weight' "[95] to the meaning placed on the Vienna Convention by the Executive Branch, the Court then noted that even though the President has ordered state courts to give effect to *Avena,* the United States has taken the position that ICJ decisions are not binding on United States courts.[96] Finally, the Court expressed doubt about giving "decisive weight" to *LaGrand* and *Avena* when the United States has since withdrawn from the Optional Protocol.[97]

Granting " 'respectful consideration' "[98] to the *LaGrand* and *Avena* decisions, the Court held that "the ICJ's interpretation cannot overcome the plain import of Article 36."[99] Turning to its prior decision in *Breard,* the Court

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92 *Id.*

93 *Id.*

94 *Id.* at 2685 (original emphasis).

95 *Id.* (quoting *Kolovrat v. Oregon,* 366 U.S. 187, 194, 81 S.Ct. 922, 6 L.Ed.2d 218 (1961)).

96 *Id.*

97 *Id.*

98 *Id.* (quoting *Breard,* 523 U.S. at 375).

99 *Id.*

stated: "the procedural rules of domestic law generally govern the implementation of an international treaty."[100] The plain language of Article 36(2)—that Article 36(1) rights "shall be exercised in conformity with the laws and regulations of the receiving State" and that those "laws and regulations must enable full effect to be given" to the intended purpose of the rights in Article 36(1)[101]—means that rules of procedural default apply to Vienna Convention claims just as they apply to claims raised under the United States Constitution.[102] The Court recognized the important role that procedural default rules play in our adversarial justice system[103] and disagreed with the ICJ's interpretation of the "full effect" language in Article 36(2).[104] Noting the problems associated with the ICJ interpretation of the "full effect" language, the Court stated:

> Article 36 claims could trump not only procedural default rules, but any number of other rules requiring parties to present their legal claims at the appropriate time for adjudication. If the State's failure to inform the defendant of his Article 36 rights generally excuses the defendant's failure to comply with relevant procedural rules, then presumably rules such as statutes of limitations and prohibitions against filing successive habeas petitions must also yield in the face of Article 36 claims.[105]

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100 *Id.*

101 Vienna Convention, art. 36(2).

102 *Sanchez-Llamas,* 126 S.Ct. at 2685.

103 *Id.* at 2685-86.

104 *Id.* at 2686.

105 *Id.*

The Court then stated that the ICJ interpretation "sweeps too broadly"[106] because Article 36(2) also requires that Article 36(1) rights " 'be exercised in conformity with the laws and regulations of the receiving State.' "[107]

In this case, we are bound by the Supreme Court's determination that ICJ decisions are not binding on United States courts. As a result, Medellín, even as one of the named individuals in the decision, cannot show that *Avena* requires us to set aside Section 5 and review and reconsider his Vienna Convention claim.

B. The Presidential Memorandum and the Supremacy Clause

Aligned on the effect of the President's memorandum, both Medellín and the United States as *amicus curiae* contend that the President's February 28, 2005, memorandum preempts Section 5 and, as a result, requires us to review and reconsider Medellín's conviction and sentence as prescribed by *Avena.* In opposition, the State challenges, among other things, the effect of the memorandum's substantive language.

The United States' and Medellín's arguments presume that the President's memorandum to the United States Attorney General amounts to an executive order.[108] The

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[106] *Id.*

[107] *Id.* (quoting Vienna Convention, art. 36(2)).

[108] *See generally* 44 U.S.C. §§ 1502, 1504, 1505(a)(1) (2000) (including "Presidential proclamations and Executive orders, except those not having general applicability and legal effect or effective only against Federal agencies or persons in their capacity as officers, agents, or employees thereof . . ." as documents that must be published in the Federal Register); 1 C.F.R. § 1.1 ("Document having general applicability and legal effect means any document issued

State disputes this, arguing that the memorandum does not contain any mandatory language: "While the President's memo rightly shows the intent and determination of the United States to enforce the consular provisions of the Vienna Convention, the memo does not order . . . state courts to disregard controlling precedents, state statutory provisions, or state procedural default rules."[109] The State's position is not without merit, but because we conclude that Medellín has not shown that the President's memorandum entitles him to review and reconsideration, we will assume, without deciding, that the memorandum constitutes an executive order.[110]

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under proper authority prescribing a penalty or course of conduct, conferring a right, privilege, authority, or immunity, or imposing an obligation, and relevant or applicable to the general public, members of a class, or persons in a locality, as distinguished from named individuals or organizations . . ."); 1 C.F.R. § 5.2(a) (including "Presidential proclamations and Executive orders in the numbered series, and each other document that the President submits for publication or orders to be published" among documents that are required to be filed for inspection with the Federal Register and published in the Federal Register).

[109] Br. of Respondent at 41.

[110] *See* Kevin M. Stack, *The Statutory President,* 90 Iowa L.Rev. 539, 546-47 (2005) (observing that "there [are no] legal requirements on the types of directives that the president must issue as an executive order, as opposed to other headings, such as a proclamation, memorandum, directive, or determination" and stating that "the particular form in which a directive is conveyed does not determine its legal effect, and may reflect nothing more than a bureaucratic choice."); Tara L. Branum, *President or King: The Use and Abuse of Executive Orders in Modern-Day America,* 28 J. Legis. 1, 6-7 (2002) (stating that "a congressional study has defined executive orders as 'directives or actions by the President' that have the 'force and effect of law' when 'founded on the authority of the President derived from the Constitution or a statute' " as well as noting that in addition to orders, "[p]residents may also issue proclamations, presidential sign-

"Governmental power over internal affairs is distributed between the national government and the several states."[111] Describing the federal government's powers over internal affairs, the Supreme Court has acknowledged: "The broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs."[112] With regard to external affairs, the federal government possesses exclusive power; it is "vested with all the powers of government necessary to maintain an effective control of international relations."[113] When acting in external affairs, the President has "plenary and exclusive power . . . as the sole organ of the federal government in the field of international relations."[114] And while the President's power "must be

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ing statements, presidential memoranda, or National Security Presidential Directives, among other types of presidential directives" and stating, "[i]n general, however, the difference is typically one of form, not substance."); *see also Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 583, 72 S.Ct. 863, 96 L.Ed. 1153 (1952).

111 *United States v. Belmont,* 301 U.S. 324, 330, 57 S.Ct. 758, 81 L.Ed. 1134 (1937); U.S. Const. amend. X; *see also Curtiss-Wright,* 299 U.S. at 316.

112 *Curtiss-Wright,* 299 U.S. at 315-16; *see also Belmont,* 301 U.S. at 330.

113 *Curtiss-Wright,* 299 U.S. at 318 (quoting *Burnet v. Brooks,* 288 U.S. 378, 396, 53 S.Ct. 457, 77 L.Ed. 844 (1933)); *see also Pink,* 315 U.S. at 233 ("Power over external affairs is not shared by the States; it is vested with the national government exclusively."); *Hines v. Davidowitz,* 312 U.S. 52, 63, 61 S.Ct. 399, 85 L.Ed. 581 (1941) ("The federal Government . . . is entrusted with full and exclusive responsibility for the conduct of affairs with foreign sovereignties.").

114 *Curtiss-Wright,* 299 U.S. at 320.

exercised in subordination to the applicable provisions of the Constitution," such power is not necessarily dependent on specific congressional authorization.[115] The President, for example, can enter into executive agreements with foreign nations without the advice and consent of the Senate.[116] Valid agreements are accorded the same status as treaties[117] and, consequently, may preempt state law if they " 'impair the effective exercise of the Nation's foreign policy.' "[118] Executive orders issued by the President must be authorized by an act of Congress or by the Constitution.[119]

Justice Jackson, in his concurring opinion in *Youngstown Sheet & Tube Company v. Sawyer,* sought to define the scope of the President's power.[120] Recognizing that he was offering "a somewhat over-simplified grouping" because "[p]residential powers are not fixed but fluctuate, depending upon their disjunction or con-

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115 *Id.*

116 *Am. Ins. Ass'n v. Garamendi,* 539 U.S. 396, 415, 123 S.Ct. 2374, 156 L.Ed.2d 376 (2003) ("the President has authority to make 'executive agreements' with other countries, requiring no ratification by the Senate or approval by Congress[.]"); *Dames & Moore,* 453 U.S. at 682 ("prior cases of this Court have also recognized that the President does have some measure of power to enter into executive agreements without obtaining the advice and consent of the Senate."); *Belmont,* 301 U.S. at 331.

117 *Garamendi,* 539 U.S. at 416; *Pink,* 315 U.S. at 230 ("A treaty is a 'Law of the Land' under the supremacy clause (art. VI, Cl.2) of the Constitution. Such international compacts and agreements as the Litvinov Assignment have a similar dignity.").

118 *Garamendi,* 539 U.S. at 419 (quoting *Zschernig v. Miller,* 389 U.S. 429, 440, 88 S.Ct. 664, 19 L.Ed.2d 683 (1968)).

119 *Youngstown Sheet & Tube Co.,* 343 U.S. at 585.

120 *Id.* at 635-38 (Jackson, J., concurring).

junction with those of Congress,"[121] Justice Jackson related the following:

- The President's "authority is at its maximum" "[w]hen the President acts pursuant to an express or implied authorization of Congress."[122] In such circumstances, the President's power "includes all that he possesses in his own right plus all that Congress can delegate."[123]
- The President's power is in "a zone of twilight" "[w]hen the President acts in absence of either a congressional grant or denial of authority."[124] When acting in "a zone of twilight," the President is dependent on "his own independent powers."[125] And "Congress may have concurrent authority."[126] The "distribution" of authority between the President and Congress may be "uncertain."[127] "[C]ongressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility."[128]

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121 *Id.* at 635.

122 *Id.*

123 *Id.*

124 *Id.* at 637.

125 *Id.*

126 *Id.*

127 *Id.*

128 *Id.*

- The President's "power is at its lowest ebb" "[w]hen the President takes measures incompatible with the expressed or implied will of Congress."[129] When acting at the "lowest ebb," the President "can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter."[130] Such power, Justice Jackson advised, "must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system."[131]

The President's memorandum cites his authority under the Constitution and laws of the United States.[132] With this in mind, we must decide whether the President has exceeded his power by directing us to give effect to the *Avena* decision under the principles of comity. The President's directive, which is dependent on his power to act in both foreign and domestic affairs, is unprecedented. What Justice Jackson proclaimed in his concurrence in *Youngstown Sheet & Tube Company* fifty-four years ago—that the judiciary "may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves" [133]—resonates with us today.

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129 *Id.*

130 *Id.*

131 *Id.* at 638.

132 Presidential Memorandum.

133 *Id.* at 634; *Dames & Moore,* 453 U.S. at 661 ("the decisions of the Court in this area have been rare, episodic, and afford little precedential value for subsequent cases.").

We hold that the President has exceeded his constitutional authority by intruding into the independent powers of the judiciary. By stating "that the United States will discharge its inter-national obligations under the decision of the International Court of Justice in . . . [*Avena*], by having State courts give effect to the decision . . . [,]"[134] the President's determination is effectively analogous to that decision. In *Sanchez-Llamas,* the Supreme Court made clear that its judicial "power includes the duty 'to say what the law is.' "[135] And that power, according to the Court, includes the authority to determine the meaning of a treaty as a "matter of federal law."[136] The clear import of this is that the President cannot dictate to the judiciary what law to apply or how to interpret the applicable law.

Medellín and the United States argue that the President's authority is at its maximum. In doing so, both rely on the President's inherent foreign affairs power to enter into executive agreements to settle claims with foreign nations as recognized by the Supreme Court in *United States v. Belmont,*[137] *United States v. Pink,*[138] *Dames & Moore v. Regan,*[139] and *American Insurance Association v. Garamendi.*[140] We therefore begin by reviewing these cases.

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134 Presidential Memorandum.

135 *Sanchez-Llamas,* 126 S.Ct. at 2684 (quoting *Marbury v. Madison,* 1 Cranch 137, 5 U.S. 137, 177, 2 L.Ed. 60 (1803)).

136 *Id.*

137 301 U.S. 324, 57 S.Ct. 758, 81 L.Ed. 1134.

138 315 U.S. 203, 62 S.Ct. 552, 86 L.Ed. 796.

139 453 U.S. 654, 101 S.Ct. 2972, 69 L.Ed.2d 918.

140 539 U.S. 396, 123 S.Ct. 2374, 156 L.Ed.2d 376.

In *Belmont,* a Russian corporation, Petrograd Metal Works, deposited funds with a private New York City banker, Belmont.[141] The Soviet Government "dissolved, terminated and liquidated [Petrograd Metal Works along with other corporations], and nationalized and appropriated all of its property and assets of every kind and wherever situated, including the deposit account with Belmont."[142] The Soviet Government later assigned all amounts owed to it from United States nationals to the United States.[143]

> The [Litvinov] [A]ssignment was effected by an exchange of diplomatic correspondence between the Soviet Government and the [Executive Branch of the] United States. The purpose was to bring about a final settlement of the claims and counterclaims between the Soviet Government and the United States; and it was agreed that the Soviet Government would take no steps to enforce claims against American nationals[.] [144]

The assignment was accompanied by the recognition of the Soviet Government by the President of the United States and the establishment of diplomatic relations between the two.[145]

The Supreme Court disagreed with the lower court's holding that giving effect to the Soviet nationalization decree would result in "an act of confiscation" and would be "contrary to the controlling public policy of

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141 301 U.S. at 325-26.

142 *Id.* at 326.

143 *Id.*

144 *Id.; Pink,* 315 U.S. at 222-23 (discussing its previous holding regarding the Litvinov Assignment in *Belmont*).

145 *Belmont,* 301 U.S. at 330.

the State of New York."[146] The Court found that the Litvinov Assignment was an international compact between the Soviet and United States governments and that the rule of a treaty's supremacy over state law applies equally to an international compact.[147] "[I]n respect of our foreign relations generally, state lines disappear. As to such purposes the State of New York does not exist."[148]

In *Pink,* the Supreme Court recognized the Litvinov Assignment's supremacy over a New York court order.[149] The state court had directed Pink, New York's Superintendent of Insurance, to pay foreign creditors' claims with assets previously held by the First Russian Insurance Company.[150] The Court ruled that the United States was entitled to those assets under the Litvinov Assignment because the Soviet Government was the successor of the First Russian Insurance Company.[151] The Court observed that the United States' claims against the Russian Government and its nationals were long-standing impediments to the United States' recognition of the Soviet Government.[152] Acknowledging that the President has implied powers in the field of foreign relations, the Court stated:

> It was the judgment of the political department that full recognition of the Soviet Government required

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146 *Id.* at 327.

147 *Id.* at 330-31.

148 *Id.* at 331.

149 315 U.S. at 227-34.

150 *Id.* at 211.

151 *Id.* at 234.

152 *Id.* at 227.

> the settlement of all outstanding problems including the claims of our nationals. Recognition and the Litvinov Assignment were interdependent. We would usurp the executive function if we held that that decision was not final and conclusive in the courts.[153]

Relying on *Belmont,* the Court declared that the Litvinov Assignment has a "similar dignity" to a treaty under the Supremacy Clause[154] and noted that "state law must yield when it is inconsistent with, or impairs the policy or provisions of . . . an international compact or agreement."[155] The Court went on to conclude:

> The action of New York in this case amounts in substance to a rejection of a part of the policy underlying recognition by this nation of Soviet Russia. Such power is not accorded a State in our constitutional system. To permit it would be to sanction a dangerous invasion of Federal authority.[156]

In *Dames & Moore,* when diplomatic officials were held hostage after the seizure of the American Embassy in Tehran, Iran, the President issued an executive order that "blocked the removal or transfer of 'all property and interests in property of the Government of Iran, its instrumentalities and controlled entities and the Central Bank of Iran which are or become subject to the juris-

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153 *Id.* at 230.

154 *Id.*

155 *Id.* at 230-31.

156 *Id.* at 233.

diction of the United States' " under the International Emergency Economic Powers Act (IEEPA).[157]

Iran released the hostages after it entered into an agreement with the United States to settle their claims, which included the termination of " 'all litigation as between the Government of each party and the nationals of the other, and to bring about the settlement and termination of all such claims through binding arbitration.' "[158] Additionally, the United States was obligated to transfer all Iranian assets in the United States to a bank to satisfy any award made by the tribunal against Iran.[159]

The President also issued several executive orders "implementing the terms of the agreement."[160] These Orders revoked all licenses permitting the exercise of 'any right, power, or privilege' with regard to Iranian funds, securities, or deposits; 'nullified' all non-Iranian interests in such assets acquired subsequent to the blocking order . . . ; and required those banks holding Iranian assets to transfer them 'to the Federal Reserve Bank of New York, to be held or transferred as directed by the Secretary of the Treasury.'[161]

Later, the President issued an executive order " 'suspend[ing]' all 'claims which may be presented to the . . . Tribunal' and provided that such claims 'shall have

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[157] 453 U.S. at 662-63 (quoting Exec. Order No. 12170, 3 C.F.R. 457 (1980), note following 50 U.S.C. § 1701 (1976 ed. Supp. III)).

[158] *Id.* at 665.

[159] *Id.*

[160] *Id.*

[161] *Id.* at 665-66 (quoting Exec. Order No. 12279, 46 Fed.Reg. 7919 (1981)).

no legal effect in any action now pending in any court of the United States.' "[162]

Dames & Moore filed suit against the United States and the Secretary of the Treasury "to prevent enforcement of the Executive Orders and Treasury Department regulations implementing the Agreement with Iran,"[163] arguing that the President exceeded his statutory and constitutional authority.[164]

The Supreme Court implemented Justice Jackson's Presidential powers framework when it considered whether the President was authorized to (1) nullify attachments made after the blocking order, (2) order the transfer of all Iranian assets to the Federal Reserve Bank, and (3) suspend pending court claims.[165] As to the first two, the Court determined that the IEEPA specifically authorized the President's actions, so those actions were, therefore, " 'supported by the strongest of presumptions and the widest latitude of judicial interpretation. . . .' "[166] Because "[a] contrary ruling would mean that the Federal Government as a whole lacked the power exercised by the President," the Court held that Dames & Moore did not overcome the presumption in the President's favor.[167]

As to the third, the Court determined that the IEEPA and Hostage Act did not specifically authorize the Pres-

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[162] *Id.* at 666 (quoting Exec. Order No. 12294, 46 Fed.Reg. 14111 (1981)).

[163] *Id.* at 666-67.

[164] *Id.* at 667.

[165] *Id.* at 668.

[166] *Id.* at 674 (quoting *Youngstown Sheet & Tube Co.,* 343 U.S. at 637 (Jackson, J., concurring)).

[167] *Id.* (citing *Youngstown Sheet & Tube Co.,* 343 U.S. at 636-37 (Jackson, J., concurring)).

ident to suspend claims pending in United States courts.[168] The Court, however, found those "statutes highly relevant in the looser sense of indicating congressional acceptance of a broad scope for executive action in circumstances such as those presented in this case."[169] The Court reasoned that the IEEPA gives the President "broad authority . . . to act in times of national emergency with respect to property of a foreign country," and the Hostage Act "indicates congressional willingness that the President have broad discretion when responding to the hostile acts of foreign sovereigns."[170] The Court went on to state: "[W]e cannot ignore the general tenor of Congress' legislation in this area in trying to determine whether the President is acting alone or at least with the acceptance of Congress."[171] Because "Congress cannot anticipate and legislate with regard to every possible action the President may find it necessary to take," a lack of specific congressional approval does not imply disapproval.[172] In fact, Congress may " 'invite' " the exercise of independent presidential authority where there is no indication that Congress sought to limit it and there is a history of congressional acquiescence.[173] Turning to that history, the Court observed that the United States had regularly settled claims against foreign nations on behalf of its nationals

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168 *Id.* at 675.

169 *Id.* at 677.

170 *Id.*

171 *Id.* at 678.

172 *Id.*

173 *Id.* (quoting *Youngstown Sheet & Tube Co.,* 343 U.S. at 637 (Jackson, J., concurring)).

by executive agreement[174] and that "Congress has implicitly approved [that] practice. . . ."[175] Congress's acceptance of such executive action was also demonstrated by the enactment of, and frequent amendment of, the International Claims Settlement Act.[176] Furthermore, pointing to the legislative history of the IEEPA, the Court found that Congress "accepted the authority of the Executive to enter into settlement agreements."[177]

Finally, referring to *Pink,* the Court noted that its prior cases "recognized that the President does have some measure of power to enter into executive agreements without obtaining the advice and consent of the Senate."[178] The Court then held that "the inferences to be drawn from the character of the legislation Congress has enacted in the area, such as the IEEPA and the Hostage Act, and from the history of acquiescence in executive claims settlement-we conclude that the President was authorized to suspend pending claims. . . ."[179] The Court also noted that Congress had not taken any action that would indicate that it disapproved of the agreement.[180]

In *Garamendi,* the United States President and German Chancellor entered into the German Foundation Agreement, which established a foundation funded by Germany and German companies "to compensate all

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174 *Id.* at 679-80.

175 *Id.* at 680.

176 *Id.* at 680-81.

177 *Id.* at 681.

178 *Id.* at 682.

179 *Id.* at 686.

180 *Id.* at 687-88.

those 'who suffered at the hands of German companies during the National Socialist era.' "[181] Because numerous class-action suits had been filed in the United States "against companies doing business in Germany during the National Socialist era[,]"[182] Germany's participation in the agreement "was conditioned on some expectation of security from lawsuits in United States courts[.]"[183] It was also "agreed that the German Foundation would work with the International Commission on Holocaust Era Insurance Claims (ICHEIC)[,]"[184] a voluntary organization formed before the German Foundation Agreement, which "negotiat[ed] with European insurers to provide information about unpaid insurance policies issued to Holocaust victims and settle[d] . . . claims brought under them."[185]

Before the establishment of the German Foundation Agreement, the California Code of Civil Procedure had been amended to enable "state residents to sue in state court on insurance claims based on acts perpetrated in the Holocaust [.]"[186] And a California statute, the Holocaust Victim Insurance Relief Act (HVIRA), compelled insurance companies doing business in California "to disclose the details of 'life, property, liability, health, annuities, dowry, educational, or casualty insurance policies' issued 'to persons in Europe, which were in effect

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181 539 U.S. at 405.

182 *Id.*

183 *Id.*

184 *Id.* at 406.

185 *Id.* at 407.

186 *Id.* at 409.

between 1920 and 1945.' "[187] After California "subpoenas were issued against several subsidiaries of European insurance companies participating in the ICHEIC," the Deputy Secretary of State wrote Garamendi, the California insurance commissioner, and the Governor of California, informing them that HVIRA essentially threatened the establishment of the German Foundation Agreement.[188] When Garamendi vowed to "enforce HVIRA to its fullest,"[189] European and United States insurance companies and the American Insurance Association sought injunctive relief, alleging that HVIRA was unconstitutional.[190]

Before the Supreme Court, the insurance companies, the American Insurance Association, and the United States as *amicus curiae* argued that the German Foundation Agreement preempted HVIRA because it "interferes with foreign policy of the Executive Branch[.]"[191]

The Court began by observing that "[a]lthough the source of the President's power to act in foreign affairs does not enjoy any textual detail, the historical gloss on the 'executive Power' vested in Article II of the Constitution has recognized the President's 'vast share of responsibility for the conduct of our foreign relations.' "[192] The Court then acknowledged the President's authority to enter into executive agreements and, in par-

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[187] *Id.* (quoting Cal. Ins.Code Ann. § 13804(a) (West Cum.Supp.2003)).

[188] *Id.* at 411.

[189] *Id.* at 411-12.

[190] *Id.* at 412.

[191] *Id.* at 413.

[192] *Id.* at 414 (quoting *Youngstown Sheet & Tube Co.,* 343 U.S. at 610-11 (Frankfurter, J., concurring)).

ticular, that Congress has acquiesced to the use of those agreements to settle claims of United States nationals against foreign governments.[193] Although the insurance claims at issue were against corporations, as opposed to a foreign government, the Court found that the distinction was not determinative because the President had acted alone in the past to settle wartime claims against private parties.[194]

Confronting preemption, the Court considered the issue under its decision in *Zschernig v. Miller* because the German Foundation Agreement did not contain a preemption clause.[195] In *Zschernig,* the Court held that an Oregon escheat statute, which, as applied, prevented inheritance by nationals of Communist countries,[196] was "an 'intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress.' "[197] The *Garamendi* Court noted that *Zschernig* "relied on statements in a number of previous cases open to the reading that state action with more than incidental effect on foreign affairs is preempted, even absent any affirmative federal activity in the subject area of the state law, and hence without any showing of conflict."[198] The Court then referred to Justice Harlan's concurring opinion in *Zschernig,* in which he stated that the majority's "implication of preemption of the

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193 *Id.* at 415.

194 *Id.* at 415-16.

195 *Id.* at 417 (discussing *Zschernig,* 389 U.S. 429, 88 S.Ct. 664, 19 L.Ed.2d 683).

196 389 U.S. at 430, 432, 436.

197 *Garamendi,* 539 U.S. at 417 (quoting *Zschernig,* 389 U.S. at 432).

198 *Id.* at 418.

entire field of foreign affairs was at odds with some other cases suggesting that in the absence of positive federal action 'the States may legislate in areas of their traditional competence even though their statutes may have an incidental effect on foreign relations.' "[199]

Although the Court questioned whether it was necessary to address field and conflict preemption, it decided that even under "Justice Harlan's view, the likelihood that state legislation will produce something more than incidental effect in conflict with express foreign policy of the National Government would require preemption of the state law."[200] Nevertheless, because Justice Harlan believed that state legislation within its traditional competence may enable the state to prevail, the Court determined "it would be reasonable to consider the strength of the state interest, judged by standards of traditional practice, when deciding how serious a conflict must be shown before declaring the state law preempted."[201]

Evaluating the President's action first, the Court concluded that the German Foundation Agreement was "within the traditional subject matter of foreign policy in which national, not state, interests are overriding. . . ."[202] The Court acknowledged that

> [t]he approach taken serves to resolve the several competing matters of national concern apparent in the German Foundation Agreement: the national interest in maintaining amicable relationships with current European allies; survivors' interests in a

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199 *Id.* (quoting *Zschernig,* 389 U.S. at 459 (Harlan, J., concurring)).

200 *Id.* at 419-20.

201 *Id.* at 420.

202 *Id.* at 421.

> 'fair and prompt' but nonadversarial resolution of their claims so as to 'bring some measure of justice . . . in their lifetimes'; and the companies' interest in securing 'legal peace' when they settle claims in this fashion.[203]

Looking then to California's interests, the Court determined those interests were weak when considered "against the backdrop of traditional state legislative subject matter[.]"[204] Although California had an interest in consumer protection, the Court noted that by limiting HVIRA to certain policies, it was "doubt[ful] that the purpose of the California law [was] an evaluation of corporate reliability in contemporary insuring in the State."[205] The Court also considered California's interest in vindicating "the claims of Holocaust survivors" but determined "that the very same objective dignifies the interest of the National Government in devising its chosen mechanism for voluntary settlements, there being about 100,000 survivors in the country, only a small fraction of them in California."[206]

The Court held that the German Foundation Agreement preempted HVIRA, reasoning, that: HVIRA "undercuts the President's diplomatic discretion and the choice he has made exercising it";[207] "the President's authority to provide for settling claims in winding up international hostilities requires flexibility in wielding 'the coercive power of the national economy' as a tool of

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203 *Id.* at 422-23.

204 *Id.* at 425.

205 *Id.* at 426.

206 *Id.*

207 *Id.* at 423-24.

diplomacy";[208] and "HVIRA is an obstacle to the success of the National Government's chosen 'calibration of force' in dealing with the Europeans using a voluntary approach."[209]

Turning to the case before us, we conclude that the reliance on the President's power to enter into executive agreements to settle disputes with other nations, and even corporations under the limited circumstances described in *Garamendi,* by Medellín and the United States is misplaced. The President has not entered into any such agreement with Mexico relating to the Mexican nationals named in the *Avena* decision. There has been no settlement. Rather, the presidential memorandum is a unilateral act executed in an effort to achieve a settlement with Mexico.

The President's independent foreign affairs power to enter into an executive agreement to settle a dispute with a foreign nation under Article II of the Constitution[210] "has received congressional acquiescence throughout its history. . . ."[211] But there is no similar history of congressional acquiescence relating to the President's authority to unilaterally settle a dispute with another nation by executive order, memorandum, or directive.[212]

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[208] *Id.* at 424 (quoting *Crosby v. Nat'l Foreign Trade Council,* 530 U.S. 363, 377, 120 S.Ct. 2288, 147 L.Ed.2d 352 (2000)).

[209] *Id.* at 425 (quoting *Crosby,* 530 U.S. at 380).

[210] U.S. Const. art. II, § 1, cl. 1.

[211] *Garamendi,* 539 U.S. at 415.

[212] *See Youngstown Sheet & Tube Co.,* 343 U.S. at 610-11 (Frankfurter, J., concurring) (stating that "a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on 'executive power' vested in the President by § 1 of Art. II.").

So, when issuing the February 28, 2005, memorandum, the President's authority was not at its maximum because the President did not act "pursuant to an express or implied authorization of Congress[.]"[213] With the President's power not being at its zenith here, we must ask whether the President has acted in the "absence of either a congressional grant or denial of authority[.]"[214] Implied congressional ratification of the President's settling of claims with foreign nations is a "practice [that] goes back over 200 years to the first Presidential administration. . . ."[215] Here, the President's unprecedented unilateral action of issuing this memorandum does not fall into the category of presidential power employed in a "zone of twilight" or where "congressional inertia, indifference or quiescence" enabled or invited the conduct of the President.[216] In this context, it is evident that the President's independent power to settle a dispute with a foreign nation, recognized throughout the nation's history, depends on the existence of an executive agreement. Given the extraordinary conduct of the President, unsupported by a history of congressional acquiescence, we find that the President's chosen method for resolving this country's dispute with Mexico is "incompatible with

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213 *Id.* at 635 (Jackson, J., concurring); *see also Dames & Moore,* 453 U.S. at 686 ("Past practice does not, by itself, create power, but 'long-continued practice, known to and acquiesced in by Congress, would raise a presumption that the action had been taken in pursuance of its consent . . . .' ") (quoting *United States v. Midwest Oil Co.,* 236 U.S. 459, 474, 35 S.Ct. 309, 59 L.Ed. 673 (1915)).

214 *Youngstown Sheet & Tube Co.,* 343 U.S. at 637 (Jackson, J., concurring).

215 *Garamendi,* 539 U.S. at 415.

216 *Youngstown Sheet & Tube Co.,* 343 U.S. at 637 (Jackson, J., concurring).

the . . . implied will of Congress[.]"[217] Accordingly, in this instance, we find that the exercise of the President's foreign affairs power "is at its lowest ebb[.]"[218] Having acted contrary to the implied will of Congress, we conclude that the President has exceeded his inherent constitutional foreign affairs authority by directing state courts to comply with *Avena*.

The United States submits that requiring a formal bilateral agreement would (1) " 'hamstring the President in settling international controversies'[219] and weaken this nation's ability to fulfill its treaty obligations"; (2) "fail to recognize the practical reality that there are occasions when a foreign government may acquiesce in a resolution that it is unwilling to formally approve"; (3) "fail to recognize that obtaining a formal agreement can be a time consuming process that is ill-suited for occasions when swift action is required"; and (4) "have the perverse effect of assigning to a foreign government veto power over the President's exercise of his authority over foreign affairs."[220]

Contrary to the United States' contentions, requiring a formal bilateral agreement does not limit or constrain the President's ability to settle international controversies or comply with treaty obligations. The President's ability to negotiate and enter into an executive agreement to settle a dispute with a foreign nation remains. In this case, however, the President failed to avail himself of that mechanism to settle this nation's dispute with

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217 *Id.*

218 *Id.*

219 Br. of United States as *Amicus Curiae,* at 30 (quoting *Garamendi,* 539 U.S. at 416).

220 *Id.*

Mexico. And although it may be time-consuming to obtain an executive agreement, the need for "swift action" does not override what the Constitution requires-an international compact or agreement.

A necessary component of any executive agreement is the negotiation process that precedes it, which ensures that each sovereignty is represented and heard. What is ultimately achieved through that process, which invariably involves compromise, will reflect a meeting of the minds-a settlement that embodies the terms, conditions, rights, and obligations agreed to during the negotiation process. At odds with this is the notion that a "foreign government may acquiesce in a resolution that it is unwilling to formally approve." A Presidential resolution that is based on an evaluation of the means necessary to resolve a dispute and then implemented in anticipation of future acquiescence by a foreign government is not a settlement. The mere possibility of later acquiescence by a foreign government is speculation. Representatives of foreign governments change, and with them, international relations are subject to modification. When it comes to foreign relations, history has proven that a nation deemed an ally on one day, may on the next, be declared an enemy. Finally, the view that an executive agreement allows "a foreign government veto power over the President's exercise of his foreign affairs powers" undermines the purpose of the negotiation process—the accomplishment of an actual settlement.

The absence of an executive agreement between the United States and Mexico is central to our determination that the President has exceeded his inherent foreign affairs power by ordering us to comply with *Avena.* We must make clear, however, that our decision is limited to the issue before us—the effect of the President's February 28, 2005, memorandum. Therefore, we express no

opinion about whether an executive agreement between the United States and Mexico providing for state court compliance with *Avena* would preempt state law.

Medellín also relies on the President's duty to faithfully execute the laws as provided in Article II, Section 3 of the Constitution.[221] According to Medellín, the President "has both the authority and the duty to enforce the United States's treaty obligations within the domestic legal system" because, under the Supremacy Clause, treaties are supreme.[222] Related to this argument is Medellín's contention that

> the President has done nothing more than confirm that the United States will do what it has already promised to do-abide by the decision of the ICJ in a dispute concerning the interpretation and application of the Vienna Convention. That promise was made by [a] constitutionally prescribed process when the President, with the advice and consent of the Senate, entered into the Vienna Convention, the Optional Protocol, the U.N. Charter, and the ICJ Statute.[223]

The Supreme Court's determination about the domestic effect of ICJ decisions-that they are entitled only to " 'respectful consideration' "[224]—based on its interpretation of the Statute of the ICJ and the United Nations Charter in *Sanchez-Llamas*[225] forecloses any argument

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221 U.S. Const. art. II, § 3.

222 Br. of Applicant at 50.

223 *Id.* at 45.

224 *Sanchez-Llamas,* 126 S.Ct. at 2685 (quoting *Breard,* 523 U.S. at 375).

225 *Id.* at 2684-85.

that the President is acting within his authority to faithfully execute the laws of the United States. By directing state courts to give effect to *Avena,* the President has acted as a lawmaker. But, as Justice Black explained in *Youngstown Sheet & Tube,* "[i]n the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker."[226] The President's February 28, 2005, determination cannot be sustained under the power of the Executive to ensure that the laws are faithfully executed.

Relying again on the enumerated powers of the President, Medellín also contends that "[t]he Constitution explicitly vests the President with authority over diplomatic and consular relations."[227] He argues: "No power is more clearly Presidential than the authority to protect U.S. citizens and their interests abroad."[228] He contends that the ability of the United States to protect its citizens may be compromised if the United States does not comply with *Avena*. Looking to statutory authority, Medellín maintains that by virtue of Title 22 United States Code, Sections 1732 and 402(a)(1)(D), "Congress has specifically referenced the President's duty in the context of protecting U.S. citizens who have been detained or arrested in foreign lands, . . . and in requiring the President to protect foreign nationals in the United States[.]"[229] Under Article II, Section 2, Clause 2 of the Constitution, the President "by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other

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226 *Youngstown Sheet & Tube Co.,* 343 U.S. at 587.

227 Br. of Applicant at 48 (citing U.S. Const. art. II, § § 2, cl. 2, 3).

228 *Id.*

229 *Id.* at 49 (citing 22 U.S.C. § § 1732, 4802(a)(1)(D)).

public Ministers and Consuls. . . ."[230] And under Article II, Section 3, the President "shall receive Ambassadors and other public Ministers. . . ."[231]

The Hostage Act, Title 22, United States Code, Section 1732, states:

> Whenever it is made known to the President that any citizen of the United States has been unjustly deprived of his liberty by or under the authority of any foreign government, it shall be the duty of the President forthwith to demand of that government the reasons of such imprisonment; and if it appears to be wrongful and in violation of the rights of American citizenship, the President shall forthwith demand the release of such citizen, and if the release so demanded is unreasonably delayed or refused, the President shall use such means, not amounting to acts of war and not otherwise prohibited by law, as he may think necessary and proper to obtain or effectuate the release; and all the facts and proceedings relative thereto shall as soon as practicable be communicated by the President to Congress.[232]

Further, Title 22, United States Code, Section 4802, which defines the "Responsibility of the Secretary of State," provides in relevant part:

> (a) Security functions.
>
> (1) The Secretary of State shall develop and implement (in consultation with the heads of other

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230 U.S. Const. art. II, § 2, cl. 2.

231 U.S. Const. art. II, § 3.

232 22 U.S.C. § 1732 (2000).

> Federal agencies having personnel or missions abroad where appropriate and within the scope of the resources made available) policies and programs, including funding levels and standards, to provide for the security of United States Government operations of a diplomatic nature and foreign government operations of a diplomatic nature in the United States. Such policies and programs shall include—
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> * * *
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> (D) protection of foreign missions, international organizations, and foreign officials and other foreign persons in the United States, as authorized by law.[233]

We have no doubt that the President and other executive branch officials play a vital role in protecting the interests of American citizens abroad when necessary. However, we do not construe the constitutional provisions as expressly or implicitly granting the President the authority to mandate state court compliance with the ICJ *Avena* decision, and Medellín cites no precedent that would lead us to conclude otherwise.

Nor can the statutes be read to authorize the President's independent action in this case. First, there is no indication that the Hostage Act specifically grants the President unlimited power to act when the President's objective is to protect the interests of American citizens traveling or residing abroad. In *Dames & Moore,* the Supreme Court reviewed the legislative history of the Hostage Act:

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[233] 22 U.S.C. § 4802(a)(1)(D) (2000).

> Congress in 1868 was concerned with the activity of certain countries refusing to recognize the citizenship of naturalized Americans traveling abroad, and repatriating such citizens against their will. These countries were not interested in returning the citizens in exchange for any sort of ransom. This also explains the reference in the Act to imprisonment 'in violation of the rights of American citizenship.'[234]

The Court further observed that the proponents of the Act "argued that 'something must be intrusted to the Executive' and that 'the President ought to have the power to do what the exigencies of the case require to rescue a citizen from imprisonment.' "[235] When determining whether the President had the authority to suspend claims in American courts, the Court found that the Hostage Act "indicates congressional willingness that the President have broad discretion when responding to the hostile acts of foreign sovereigns ."[236] But implied congressional authority vested in the President to protect United States citizens in response to the hostile acts of another nation where the circumstances are exigent shows that the President's power to protect United States citizens abroad is not unqualified. We cannot accept Medellín's argument that the Hostage Act grants the President unfettered authority to act to protect the interest of United States citizens abroad. It strains logic to conclude that the power delegated to the President under the Hostage Act permits the President to engage in any conduct that will ensure the maintenance of that power.

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234 453 U.S. at 676 (internal citations omitted).

235 *Id.* at 678.

236 *Id.* at 677.

Nevertheless, we need not decide the scope of any implied power conferred to the President under the Hostage Act, because, as we have already concluded in this case, "there is [not] a history of congressional acquiescence in conduct of the sort engaged in by the President."[237] When concluding that the President had the authority to suspend pending court claims in *Dames & Moore,* the Court relied on not only the President's power under the Hostage Act, but on the President's power under the International Emergency Economic Powers Act and the President's power to settle claims with foreign nations by executive agreement.[238] In doing so, the Court specifically noted: "Crucial to our decision today is the conclusion that Congress has implicitly approved the practice of claim settlement by executive agreement."[239] We decline to find that the Hostage Act authorizes the President to order this Court to comply with *Avena.*

Although Section 4802(a)(1)(D), Title 22, United States Code, provides that the Secretary of State[240] has the duty to protect "foreign missions, international organizations, and foreign officials and other foreign persons in the United States," that duty extends only to things " 'authorized by law.' "[241] The statute, therefore, cannot be regarded as an independent source of authority for the President's memorandum ordering state courts to comply with *Avena.*

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237 *Id.* at 678-79.

238 *Id.* at 677-82, 686.

239 *Id.* at 680.

240 22 U.S.C. § 2651 (2000) ("There shall be at the seat of government an executive department to be known as the 'Department of State', and a Secretary of State, who shall be the head thereof.").

241 22 U.S.C. § 4802(a)(1)(D).

In further support of its position that the President has the authority to direct state courts to give effect to the ICJ *Avena* decision, the United States directs us to the United Nations Charter and the United Nations Participation Act. The United States maintains that the ratification of the Charter "implicitly grants the President 'the lead role' in determining how to respond to an ICJ decision."[242] And under the United Nations Participation Act, according to the United States, the President, through appointed officials, "represents the United States in the United Nations, including before the ICJ and in the Security Council."[243] Moreover, the United States argues that Congress "expressly anticipated that these officials would . . . perform 'other functions in connection with the participation of the United States in the United Nations' at the direction of the President or his representative to the United Nations."[244]

Titled "Representation in Organization," Title 22, United States Code, Section 287 provides in part:

> (a) Appointment of representative; rank, status and tenure; duties. The President, by and with the advice and consent of the Senate, shall appoint a representative of the United States to the United Nations who shall have the rank and status of Ambassador Extraordinary and Plenipotentiary and shall hold office at the pleasure of the President. Such representative shall represent the United States in the Security Council of the United Nations and may serve ex officio as representative of the United

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242 Br. of United States as *Amicus Curiae,* at 20-21 (quoting *Garamendi,* 539 U.S. at 415).

243 *Id.* at 20.

244 *Id.* (quoting 22 U.S.C. § 287(a), (b) (2000)).

States in any organ, commission, or other body of the United Nations other than specialized agencies of the United Nations, and shall perform such other functions in connection with the participation of the United States in the United Nations as the President may, from time to time, direct.

(b) Appointment of additional representatives; rank, status and tenure; duties; reappointment unnecessary. The President, by and with the advice and consent of the Senate, shall appoint additional persons with appropriate titles, rank, and status to represent the United States in the principal organs of the United Nations and in such organs, commissions, or other bodies as may be created by the United Nations with respect to nuclear energy or disarmament (control and limitation of armament). Such persons shall serve at the pleasure of the President and subject to the direction of the Representative of the United States to the United Nations. They shall, at the direction of the Representative of the United States to the United Nations, represent the United States in any organ, commission, or other body of the United Nations, including the Security Council, the Economic and Social Council, and the Trusteeship Council, and perform such other functions as the Representative of the United States is authorized to perform in connection with the participation of the United States in the United Nations. Any Deputy Representative or any other officer holding office at the time the provisions of this Act, as amended, become effective shall not be required to be reappointed by reason of the enactment of this Act, as amended.[245]

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[245] 22 U.S.C. § 287(a), (b).

Starting with the United Nations Charter, we hold it does not authorize the type of action that the President has taken here. The President is still bound by the Constitution when deciding how the United States will respond to an ICJ decision,[246] and, as stated above, the President exceeded his implied foreign affairs power by directing state courts to give effect to *Avena*.

Additionally, the subsections of the United Nations Participation Act set forth above do not support the President's determination. Because the participation of the United States in proceedings before the ICJ does not bind the courts of this country to comply with a decision of the ICJ,[247] it necessarily follows that the participation of the United States in the United Nations does not authorize the President to order state courts to give effect to any decision rendered by the ICJ.

Based on the foregoing, we hold that the President's memorandum ordering us to give effect to the ICJ *Avena* decision cannot be sustained under the express or implied constitutional powers of the President relied on by Medellín and the United States or under any power granted to the President by an act of Congress cited by Medellín and the United States.[248] As such, the President has violated the separation of powers doctrine by intruding into the domain of the judiciary, and therefore, Medellín cannot show that the President's memorandum preempts Section 5.

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246 *Curtiss-Wright Export Corp.,* 299 U.S. at 320.

247 *Sanchez-Llamas,* 126 S.Ct. at 2685.

248 *Youngstown Sheet & Tube Co.,* 343 U.S. at 585.

C. Section 5(a)(1), Article 11.071 of the Texas Code of Criminal Procedure

We now consider whether Medellín has satisfied the requirements of Article 11.071, Section 5(a)(1) of the Texas Code of Criminal Procedure so as to permit this Court to review and reconsider his Vienna Convention claim. Section 5(a)(1) provides:

> If a subsequent application for a writ of habeas corpus is filed after filing an initial application, a court may not consider the merits of or grant relief based on the subsequent application unless the application contains sufficient specific facts establishing that:
>
> > the current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application filed under this article . . . because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application[.][249]

Medellín contends that the *Avena* decision and the Presidential memorandum serve as previously unavailable factual and legal bases because both issued after his first application was denied. The State maintains that the legal basis for Medellín's claim, the Vienna Convention, was available before his trial and when he filed his first application. Medellín claims, however, that he is not reasserting the same claim presented on his first application; he contends that the *Avena* decision and the President's memorandum provide him with the right to prospective review and reconsideration. We will address whether the *Avena* decision or the Presidential memo-

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[249] Tex.Code Crim. Proc. art. 11.071 § 5(a)(1).

randum qualify as a new factual or legal basis under Section 5(a)(1) separately.

1. Factual Basis

Section 5(e) of Article 11.071 states:

> For purposes of Subsection (a)(1), a factual basis of a claim is unavailable on or before a date described by Subsection (a)(1) if the factual basis was not ascertainable through the exercise of reasonable diligence on or before that date.[250]

What constitutes a "factual basis" under Section 5(a)(1) is not defined. Therefore, to determine whether *Avena* or the President's memorandum qualify as a previously unavailable factual basis under Section 5(a)(1), we must perform a statutory-construction analysis to determine the meaning of "factual."

When interpreting a statute, "we seek to effectuate the 'collective' intent or purpose of the legislators who enacted the legislation."[251] In doing so, we examine the "literal text"[252] of a statute, which includes all words and phrases,[253] "to discern the fair, objective meaning of that text at the time of its enactment."[254] And "if the meaning of the statutory text, when read using the established canons of construction relating to such text, should have been plain to the legislators who voted on it, we ordinarily give effect to that plain meaning."[255] We will not

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250 Tex.Code Crim. Proc. art. 11.071 § 5(e).

251 *Boykin v. State,* 818 S.W.2d 782, 785 (Tex.Crim.App.1991).

252 *Id.*

253 *Nguyen v. State,* 1 S.W.3d 694, 696 (Tex.Crim.App.1999).

254 *Boykin,* 818 S.W.2d at 785.

255 *Id.*

give effect to the plain meaning of a statute's text if, when applied, it leads to an absurd result that could not have been intended by the Legislature.[256] When the application of a statute's literal text leads to an absurd result, or the text is ambiguous, we consult extratextual sources to determine a statute's meaning.[257]

In determining the plain meaning of "factual" in Section 5(a)(1), we are guided by the applicable canons of construction, Article 3.01 of the Code of Criminal Procedure, which governs how words in the Code are to be understood,[258] and Section 311.011 of the Texas Government Code (the Code Construction Act), which provides for the common and technical use of words in the Code.[259] Article 3.01 of the Code of Criminal Procedure states that "[a]ll words, phrases and terms used in this Code are to be taken and understood in their ususal acceptation in common language, except where specially defined."[260] The Code Construction Act provides: "Words and phrases shall be read in context and construed according to the rules of grammar and common usage."[261]

To discern what the usual acceptation of the word "factual" is in common language or how it is construed according to the rules of common usage, we look to dictionary definitions.[262] The word "factual," according to

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256 *Id.*

257 *Id.* at 785-86.

258 Tex.Code Crim. Proc. art. 3.01 (Vernon 2004).

259 Tex. Gov't Code § § 311.002, 311.011 (Vernon 2003).

260 Tex.Code Crim. Proc. art. 3.01.

261 Tex. Gov't Code § 311.011(a).

262 *Ex parte Rieck,* 144 S.W.3d 510, 512 (Tex.Crim.App.2004); *Lane v. State,* 933 S.W.2d 504, 515 n. 12 (Tex.Crim.App.1996) (cit-

Webster's Third New International Dictionary, means "of, relating to, or concerned with facts" and "restricted to, involving, or based on fact. . . ."[263] The *Dictionary of Modern American Usage* offers two additional definitions-"of or involving facts" and "true."[264] Illustrating the difference between the two definitions, the *Dictionary of Modern American Usage* states that the first meaning "appears in phrases such as *factual finding* and *factual question,*" while the second meaning "appears in phrases such as *factual account* and *factual narrative.*"[265] The meaning of "factual" in Section 5(a)(1) falls within the first category of phrases described in the *Dictionary of Modern American Usage* because "factual" is paired with the word "basis." We turn our attention to the meaning of the word "fact" according to its usual acceptation in common language and the rules of common usage.

Our review of multiple dictionaries reveals that there are numerous definitions for the word "fact."[266] For instance, *Webster's Third New International Dictionary*

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ing *Bingham v. State,* 913 S.W.2d 208, 209-10 (Tex.Crim.App.1995)) (reaffirming "that use of dictionary definitions of words contained in the statutory language is part of the 'plain meaning' analysis that an appellate court initially conducts [under *Boykin*] to determine whether or not the statute in question is ambiguous.").

263 Webster's Third New International Dictionary 813 (2002).

264 A Dictionary of Modern American Usage 284 (1998).

265 *Id.* at 284-85 (original emphasis).

266 *See* Webster's Third New International Dictionary 813 (2002); The American Heritage College Dictionary 489 (3d ed.2000); Black's Law Dictionary 610 (7th ed.1999); A Dictionary of Modern Legal Usage 346 (2d ed.1995); The Random House Dictionary of the English Language 691 (2d ed.1987); A Concise Dictionary of Law 144 (1983); Jowitt's Dictionary of English Law 764 (2d ed.1977); Ballentine's Law Dictionary 449 (3d ed.1969).

alone contains six definitions.[267] Although there are a variety of definitions for the word "fact," it must be considered in the context in which it appears.[268] We find it instructive that the Legislature expressly distinguished factual basis (fact) from legal basis (law) in Section 5(a)(1). This distinction accounts for the two necessary, but separate, parts of any subsequent claim: the factual basis and the legal basis. With this in mind, we find that the following definition of "fact" from *Black's Law Dictionary* accurately reflects the Legislature's intent: "[a]n actual or alleged event or circumstance, as distinguished from its legal effect, consequence, or interpretation."[269] Giving effect to the plain meaning of "fact" does not lead to an absurd result that the Legislature could not have intended. It is the application of the law to a fact or set of facts that yields the legal effect, consequence, or interpretation. And in some cases, the legal effect, consequence, or interpretation creates a new rule of law.[270]

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[267] Webster's Third New International Dictionary 813.

[268] Tex. Gov't Code § 311.011; *Lane,* 933 S.W.2d at 515 n. 12.

[269] Black's Law Dictionary 610.

[270] *See, e.g., Roper v. Simmons,* 543 U.S. 551, 568, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005) ("A majority of States have rejected the imposition of the death penalty on juvenile offenders under 18, and we now hold this is required by the Eighth Amendment."); *Crawford v. Washington,* 541 U.S. 36, 68, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) ("the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination."); *Atkins v. Virginia,* 536 U.S. 304, 321, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002) ("Construing and applying the Eighth Amendment in the light of our 'evolving standards of decency,' we therefore conclude that such punishment is excessive and that the Constitution 'places a substantive restriction on the State's power to take the life' of a mentally retarded offender."); *Apprendi v. New Jersey,* 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) (holding that under

The actual event or circumstance involved in Medellín's case is that law enforcement authorities did not inform Medellín of his right to contact the Mexican consulate after his arrest as required by Article 36(1)(b). This fact provided the factual basis for Medellín's challenge to his conviction and sentence under the Vienna Convention on his first application for a writ of habeas corpus. We disposed of this claim on an independent state ground.[271] Agreeing with the trial court, we found that the legal effect or consequence of Medellín's Vienna Convention claim resulted in the application of our state procedural default rule due to Medellín's failure to object at trial.[272]

Medellín now argues that *Avena* is a previously unavailable factual basis for purposes of Section 5(a)(1). We disagree. For purposes of Section 5(a)(1), the *Avena* decision is properly categorized as law, even though it is not binding on us.[273] The ICJ's decision in *Avena* is not a fact and, therefore, does not qualify as a previously unavailable factual basis under Section 5(a)(1).

As to the President's memorandum, Medellín asserts that "[a] judgment giving rise to new claims issued after an applicant's habeas application renders the factual basis of the claim 'unavailable' under Section 5(a)."[274] Thus, he urges, the President's memorandum is a new

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the Fifth, Sixth and Fourteenth Amendments, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.").

271 *Ex parte Medellín,* No. WR-50,191-01 (Tex.Crim.App. Oct. 3, 2001) (not designated for publication).

272 *Id.*

273 *Sanchez-Llamas,* 126 S.Ct. at 2682.

274 Br. of Applicant at 54.

"factual basis" entitling him to review. We also disagree with this argument.

Medellín broadly claims that "whether considered as a factual or legal basis . . . the President's Determination was [not] available at the time of his initial application for purposes of Section 5(a)" without further explanation as to how the memorandum constitutes a "factual" basis.[275] Medellín's arguments, however, address the memorandum exclusively as a legal, not factual, basis; he argues that the President's memorandum "constitutes a binding federal rule of decision." But even if Medellín had devised a complete argument that the President's memorandum constitutes a "factual basis," we would still reach the same conclusion. The President's memorandum directs the state courts to give effect to the ICJ *Avena* decision, and in so doing, the President specifically relies on his authority under "the Constitution and the laws of the United States of America. . . ."[276] This indicates that the President intended his memorandum to have the effect of law. According to our earlier analysis of "factual," we determined that the word means "of or involving"[277] "[a]n actual or alleged event or circumstance, as distinguished from its legal effect, consequence, or interpretation."[278] Here, even though we have concluded that the President's memorandum is not binding federal law as argued by Medellín and the United States, we cannot say that the memorandum falls into that definition. For purposes of Section 5(a)(1), like the *Avena* decision, the President's memorandum is properly classified as a "legal basis," not a factual one.

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275 *Id.*

276 Presidential Memorandum.

277 A Dictionary of Modern American Usage 284 (1998).

278 Black's Law Dictionary 610.

2. Legal Basis

Because neither the *Avena* decision nor the President's memorandum constitute a "factual basis," we now consider whether either qualifies as a previously unavailable "legal basis" under Section 5(a)(1). Section 5(d) of Article 11.071 states:

> a legal basis of a claim is unavailable on or before a date described by Subsection (a)(1) if the legal basis 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.[279]

Although the *Avena* decision and the Presidential memorandum were not available when Medellín filed his first application, neither constitutes a new legal basis under the plain language of Section 5(d).[280] First, neither has been recognized as providing a right to review and reconsideration in "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. . . ."[281] Indeed, as we noted earlier, the United States Supreme Court recently reaffirmed its holding in *Breard*-that procedural default rules may bar Vienna Convention claims.[282] In *Sanchez-Llamas,* the Supreme Court concluded that *Avena* is entitled to only " 'respectful consideration,' "[283] and as such, that decision is not binding

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279 Tex.Code Crim. Proc. art. 11.071 § 5(d).

280 *Boykin,* 818 S.W.2d at 785.

281 Tex.Code Crim. Proc. art. 11.071 § 5(d).

282 *Sanchez-Llamas,* 126 S.Ct. at 2687.

283 *Id.* at 2683 (quoting *Breard,* 523 U.S. at 375).

on us. Likewise, because we have concluded that the President has exceeded his authority by ordering state courts to give effect to *Avena,* the President's determination is not binding federal law. Because *Avena* and the President's memorandum are not binding law, neither of them can serve as a previously unavailable legal basis for purposes of Section 5(a)(1).

IV. CONCLUSION

Having found that the ICJ *Avena* decision and the Presidential memorandum do not constitute binding federal law that preempt Section 5 under the Supremacy Clause of the United States Constitution and that neither qualify as a previously unavailable factual or legal basis under Section 5(a)(1), we dismiss Medellín's subsequent application for a writ of habeas corpus under Article 11.071, Section 5.

WOMACK, J., concurs in the result.

KELLER, P.J., filed a concurring opinion.

PRICE, J., filed a concurring opinion.

HERVEY, J., filed a concurring opinion.

COCHRAN, J., filed a concurring opinion in which JOHNSON, and HOLCOMB, JJ., joined.

[CONCURRING OPINION]

KELLER, P.J., filed a concurring opinion.

On behalf of the United States as amicus curiae, the U.S. Attorney General's office has taken the position that President Bush's memorandum constitutes an order requiring this Court to ignore rules of procedural default (including rules governing contemporaneous objections

at trial and statutes governing subsequent habeas corpus applications) and evaluate anew whether applicant was prejudiced by a failure to comply with the Vienna Convention on Consular Relations. I conclude that the President of the United States does not have the power to order a state court to conduct such a review.

"Although the source of the President's power to act in foreign affairs does not enjoy any textual detail, the historical gloss on the 'executive Power' vested in Article II of the Constitution has recognized the President's 'vast share of responsibility for the conduct of our foreign relations.' "[1] Nevertheless, the executive's power in this regard is not without limits, as it must still be "exercised in subordination to the applicable provisions of the Constitution."[2] Among the principles enshrined in the United States Constitution is that of federalism-the separate sovereignty of the state and federal governments-embodied in the structure of the Constitution,[3] as well as in the Tenth Amendment.[4] Although federalism was "the

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[1] *American Ins. Assn. v. Garamendi,* 539 U.S. 396, 414, 123 S.Ct. 2374, 156 L.Ed.2d 376 (2003) (quoting in part *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 610-611, 72 S.Ct. 863, 96 L.Ed. 1153 (1952) (Frankfurter, J., concurring)).

[2] *Id.* at 416 n. 9.

[3] *See* U.S. Const., Arts. I, § 2 (members of the House of Representatives elected by people "of the several States"), § 3 (Senate composed of two senators from each state), § 4 (time, place and manner of elections for representatives and senators prescribed by each state), § 10 (specific prohibitions against the states), II, § 1 (states appoint presidential electors), IV, § 1 (full faith and credit between states), § 2 (privileges and immunities of citizens of the states), § 3 (admission of new states into the union), § 4 (duties of U.S. to its states), V (state ratification of amendments proposed by Congress).

[4] U.S. Const., Amend X: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

unique contribution of the Framers [of the U.S. Constitution] to political science and political theory," there remains "much uncertainty respecting the existence, and the content, of standards that allow the Judiciary to play a significant role in maintaining the design contemplated by the Framers."[5] Nevertheless, I agree with Justice Kennedy that "the federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for [the judiciary] to admit inability to intervene when one or the other level of Government have tipped the scales too far."[6]

In line with Justice Kennedy's pronouncement, the United States Supreme Court has increasingly stepped forward to prevent the national government from intruding into the sphere of state power. The Court has adopted a general policy against federal injunctive interference with the course of a pending state criminal prosecution.[7] The Court has struck down Congressional enactments relating to criminal justice that concerned traditional areas of state authority[8] and that imposed obligations on state officials with respect to a federal regulatory scheme.[9]

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[5] *United States v. Lopez,* 514 U.S. 549, 575, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995) (Kennedy, J., concurring).

[6] *Id.* at 578.

[7] *Younger v. Harris,* 401 U.S. 37, 45-54 (1971) (abstention doctrine).

[8] *Lopez,* 514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626 (striking down law criminalizing possession of a firearm in a gun-free school zone); *United States v. Morrison,* 529 U.S. 598, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000) (invalidating statutorily-created civil cause of action for victims of gender-motivated violence).

[9] *Printz v. United States,* 521 U.S. 898, 117 S.Ct. 2365, 138 L.Ed.2d 914 (1997) (striking provision requiring state and local law enforcement officials to conduct background checks on prospective handgun purchasers).

Although the Court has not struck down a treaty or an executive agreement for impermissibly intruding upon state authority, it has in several instances construed such documents to avoid preemption of state law where the state law in question involved a traditional area of state competence and applied equally to citizens and non-citizens.[10]

One of those instances regards the Vienna Convention treaty itself; the Supreme Court has explicitly recognized that the treaty does not preempt state rules of procedural default.[11] To the extent that the President purports to trump such state rules by the memorandum, then, he does not act pursuant to the treaty's authorization. Nor does he act according to the Optional Protocol, which gave the International Court of Justice (ICJ) jurisdiction of disputes "arising out of the interpretation or application of the Convention" but did not purport to confer jurisdiction regarding the *remedy* to apply in the event the ICJ determined that a violation of the treaty had occurred.[12] Even if the ICJ had been authorized to

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[10] *Todok v. Union State Bank,* 281 U.S. 449, 454-455, 50 S.Ct. 363, 74 L.Ed. 956 (1930) (treaty of amity and commerce did not preempt Nebraska homestead law); *Guaranty Trust Co. v. United States,* 304 U.S. 126, 142-143, 58 S.Ct. 785, 82 L.Ed. 1224 (1938) (executive agreement with the Soviet Government assigning economic claims did not preempt New York statute of limitations); *Sanchez-Llamas v. Oregon,* ___ U.S. ___, ___ - ___, 126 S.Ct. 2669, 2682-2688, 165 L.Ed.2d 557 (2006) (Vienna Convention treaty does not preempt state rules of procedural default).

[11] *Sanchez-Llamas, supra.*

[12] Under the ICJ statute, four different topics can be made subject to the international court's compulsory jurisdiction:

a. the interpretation of a treaty;

b. any question of international law;

(*footnote continued*)

craft a remedy, however, that authorization surely could not include deciding which level or organ of government would implement such a remedy; the latter would be an internal matter for the party-nation itself to determine.

Consequently, the President must depend solely upon his inherent foreign relations power to justify the action he has taken, and as a result, his action should be subject to greater scrutiny. It is true that the President's foreign relations power can accomplish the preemption of state law through, for example, executive agreement.[13] But the treaty process, with the requirement that a supermajority of the Senate concur, is in the United States Constitution for a reason;[14] Alexander Hamilton suggested in the Federalist Papers that the provision operates as an important check on the President's power.[15] I find it significant that this check is exercised by the Senate, the organ of the national government most closely aligned with the states.

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c. the existence of any fact which, if established would constitute a breach of an international obligation,

d. *the nature and extent of the reparation to be made for the breach of an international obligation.*"

Statute of the Court of International Justice, Art. 36, § 2 (emphasis added). The Optional Protocol subjects to the ICJ's compulsory jurisdiction only "[d]isputes arising out of the *interpretation or application* of the Convention." Optional Protocol to Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, Art. I (emphasis added).

[13] *Garamendi,* 539 U.S. at 416 ("Generally, then valid executive agreements are fit to preempt state law, just as treaties are," but see caveat referenced earlier in this opinion and cited in footnote 2).

[14] *See* U.S. Const., Art. II, § 2 ("He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided that two thirds of the Senators present concur").

[15] Alexander Hamilton, Federalist Papers, No. 75.

The Supreme Court has suggested that the proper analysis for determining whether a president's exercise of his foreign relations power preempts state law is to determine first whether the state has acted within an area of "traditional state responsibility," and if it has, to assess the degree of conflict with federal policy and the strength of the state interest involved.[16] Unlike other federal preemption cases in which a state has prevailed, we address here an express, stark conflict between the President's assertion of power (at least under the Justice Department's interpretation) and the state law at issue. Nevertheless, given the principle that a weighty state interest lessens the likelihood of federal preemption, it follows that a president cannot use his foreign affairs authority to intrude into the state arena with impunity: at some point, the national interest is served in too attenuated a manner by the specific presidential action, and the state interest intruded upon is too fundamental, to permit a president's intervention.

Such a case is now before us. Criminal justice is an area primarily of state concern. The Supreme Court has repeatedly recognized that the "States possess primary authority for defining and enforcing the criminal law."[17] And states have, to say the least, an overwhelming interest in the procedures followed in their own courts. In *Younger,* the Supreme Court found that "a proper respect for state functions" counseled against injunctive interference by the federal courts with the progress of a state prosecution.[18] But the presidential memorandum attempts

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[16] *Garamendi,* 539 U.S. at 420, 420 n. 11.

[17] *Lopez,* 514 U.S. at 561 n. 3 (quoting *Brecht v. Abrahamson,* 507 U.S. 619, 635, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993) (quoting *Engle v. Isaac,* 456 U.S. 107, 128, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982))).

[18] 401 U.S. at 44.

to do something just as intrusive: it attempts to *force* the states to conduct proceedings they would not otherwise conduct and to do so in a manner inconsistent with their own procedures. The Supreme Court has itself refrained from engaging in this kind of "lawmaking."[19] Moreover, the memorandum ignores "the importance of the procedural default rules in an adversary system."[20] These rules, which are neutral-applying to everyone, not just foreign nationals-"are designed to encourage parties to raise their claims promptly and to vindicate the law's important interest in finality of judgments."[21] When a habeas petitioner asked the United States Supreme Court in *Sanchez-Llamas* to exempt Vienna Convention claims from the rules of procedural default, the Court responded that the relief requested was "by any measure, extraordinary."[22] The Court observed that the exception to procedural default rules requested in that case (as in this one) "is accorded to almost no other right, including many of our most fundamental constitutional protections."[23] The President's action here is unprecedented.

And such extraordinary action is not necessary. The adversary system offers the foreign national the opportunity to raise a Vienna Convention claim before or dur-

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19 *Sanchez-Llamas,* 126 S.Ct. at 2680 ("where a treaty does not provide a particular remedy, either expressly or implicitly, it is not for the federal courts to impose one on the States through lawmaking of their own"), 2687 (The petitioner "asks us to require the *States* to hear Vienna Convention claims raised for the first time in *state* post-conviction proceedings. Given that the convention itself imposes no such requirement, we do not perceive any grounds for us to revise state procedural rules in this fashion.") (emphasis in original).

20 *Id.* at 2685.

21 *Id.*

22 *Id.* at 2687.

23 *Id.* at 2688.

ing trial. If he does so, the trial court is in a position to afford an appropriate remedy—if a judicial remedy is appropriate at all.[24] If the foreign national is represented by counsel, and counsel fails to raise the Vienna Convention issue in a timely fashion, then a "safety valve" exists in the form of an ineffective assistance of counsel claim that can be raised on an initial application for writ of habeas corpus. If all other avenues in the state are exhausted, the foreign national can still apply to the Board of Pardons and Parole and the Governor for executive clemency. And the foreign national has the option to litigate a habeas petition in the federal system.

The President has made an admirable attempt to resolve a complicated issue involving the United States' international obligations. But this unprecedented, unnecessary, and intrusive exercise of power over the Texas court system cannot be supported by the foreign policy authority conferred on him by the United States Constitution. As a consequence, the presidential memorandum does not constitute a new legal or factual basis for relief under Art. 11 .071, § 5, nor does it override § 5's requirements.

With these comments, I concur in the judgment with regard to the analysis of the president's memorandum and otherwise join the Court's opinion.

CONCURRING OPINION

PRICE, J., filed a concurring opinion.

I agree with the majority's analysis and rationale, and, therefore, join the majority. Nevertheless, I write separately to advise law enforcement of this State to honor the provisions of Article 36 of the Vienna Convention

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[24] *See Id.* at 2680 (expressing doubt about the appropriateness of a judicial remedy).

and apprise foreign nationals of their rights under the treaty.

A key issue, however, is the question of whether Article 36 of the Vienna Convention even confers individual rights upon detained foreign nationals. I believe it does. Pertinent language of the treaty states "if [the detained foreign national] so requests, the competent authorities of the receiving State shall, without delay, inform the consular post . . . ."[1] Since a foreign national may request that the consular official be notified, it is quite logical to conclude that it is the foreign national's personal decision to make whether the consulate is or is not notified. This decision is not left to public or diplomatic officials; rather, the detainee is to decide. Furthermore, the treaty explicitly directs a consular officer to desist in aiding a detained national if that is the national's desire.[2] This language provides additional support for the position that Article 36 creates individual rights for the signatory-nation's citizenry. It is apparent that the power of choice is left to the foreign national. Though the United States Supreme Court has not directly ruled on this issue, a strong voice on that Court favors the position that individual rights are conferred by the Vienna Convention.[3]

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[1] Vienna Convention on Consular Relations and Optional Protocol on Disputes ("Vienna Convention") art. 36(1)(b), *done* April 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

[2] *Id.* at art. 36(1)(c).

[3] *See Sanchez-Llamas v. Oregon,* — U.S. —, —, 126 S.Ct. 2669, 2688, 165 L.Ed.2d 557 (2006) (Ginsberg, J., concurring) (agreeing with the dissent of Justice Breyer, Justice Stevens and Justice Souter that the Vienna Convention "grants rights that may be invoked by an individual in a judicial proceeding"). Since the Court decided the case on procedural default grounds, the majority in *Sanchez-Llamas* assumed, without deciding, that the treaty grants individual rights. *Id.* at 2674.

Article 36 of the Vienna Convention provides foreign nationals the option to invoke their right of access and communication with the consular officer.[4] Without being aware of this option, the vast majority of nationals arrested will almost certainly fail to invoke this right and succumb to our procedural default rules. Since I agree with the majority's application of procedural default to Article 36, I find it all the more imperative for a foreign national in the custody of law enforcement in this State to be informed of his treaty rights. Unless he is informed of what his rights are under the Vienna Convention, those rights will be of no use to him. One must be aware of these rights before one can properly exercise them. Not only is it imperative as a practical matter, Article 36 compels it.[5]

So long as the United States recognizes the Vienna Convention on Consular Relations, this State and all law enforcement that fall within its boundaries are required to faithfully comply with the Convention's agreed-upon provisions.[6] The fact that this State borders a foreign nation only amplifies the need for authorities to be well-versed in the language of Article 36. I believe this does not create an undue burden on law enforcement, but brings to light an obligation that must be fulfilled in the same manner we all hope is reciprocated by other nations whose detained nationals might be United States citizens. With these additional comments, I respectfully join the majority.

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[4] Vienna Convention art. 36(1), *supra* fn. 1.

[5] *See* Vienna Convention art. 36(1)(b), *supra* fn. 1 ("The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph[.]").

[6] U.S. Const. art. VI, cl. 2.

CONCURRING OPINION

HERVEY, J., filed a concurring opinion.

This international *cause célèbre* centers around this applicant who makes no claim that he did not brutally rape and murder two teenage girls (ages 14 and 16) with fellow gang members over 13 years ago in the summer of 1993. The evidence from applicant's 1994 trial shows that he boasted about his active participation in these crimes. He bragged about how he sexually assaulted the two victims. He related that he put his foot on the throat of one of the girls because he was having difficulty strangling her with a shoelace and she would not die. The girls were unrecognizable when their bodies were found.

This case has dragged on for an amount of time equal to almost the entirety of the lives of these two girls. For many years, in both state and federal courts, applicant has received the almost unparalleled due process protections afforded by our country's laws. Now, from halfway around the world, the International Court of Justice in its *Avena* decision has ordered our state courts to review applicant's Article 36 Vienna Convention claim which applicant did not even raise until his first state habeas application. The President of the United States has made a similar request.

But, all of this is really much ado about nothing because applicant received essentially the review mandated by the *Avena* decision during his initial state habeas corpus proceeding.[1] The Court's 60 plus page opinion disposing of applicant's current successive

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[1] *See, e.g.,* Amicus Brief of the Criminal Justice Legal Foundation at 5 (question of whether the Texas courts are required to comply with *Avena* decision is moot because applicant has already received the adjudication to which *Avena* says he is entitled).

habeas corpus application provides applicant with much more than he deserves and is also consistent with the President's unprecedented memorandum expressing the United States' intent to discharge its international obligations under *Avena* "by having State courts give effect to the [*Avena*] decision in accordance with general principles of comity." The Court's opinion in this proceeding affords the *Avena* decision all the "respectful consideration" that it deserves "in accordance with general principles of comity."

Finally, applicant is by no means a stranger in a strange land. He has lived in this country and enjoyed its benefits since he was three-years old. From the record, it appears that he is fluent in English. Other than his surname, there is nothing to suggest that he is anything other than native-born. Indeed, he did not bother telling the police of his non-citizenship. And the constitutional rights available to all accused persons in American courts are his, as well. According to the record, they were scrupulously protected.

Nevertheless, applicant maintains that the lack of intentional, reckless, or negligent wrongdoing by the State (other than, perhaps, the lack of clairvoyance), and despite his non-assertion of any privilege or immunity, he is entitled to an immunity heretofore not afforded to any citizen or nonresident under Texas or Federal law-immunity from procedural default. He argues that he has this immunity simply because he happened to be born on foreign soil approximately 28 years ago and, for whatever reason, has elected not to apply for United States citizenship.

With these comments, I join the Court's opinion.

OPINION

COCHRAN, J., filed a concurring opinion, in which JOHNSON, and HOLCOMB, JJ., joined.

I join all of the Court's opinion except for Section IIIB dealing with the Presidential Memorandum. I am unable to conclude that a memorandum from the President to his Attorney General constitutes the enactment of federal law that is binding on all state courts. This memorandum, discussing compliance with the decision of the International Court of Justice in *Avena,* looks much more like a memo than a law. The Solicitor General, in his amicus brief, has attached a copy of the President's memo, entitled "Memorandum for the Attorney General[,]" as well as a copy of a letter written by Attorney General Alberto R. Gonzales to The Honorable Greg Abbott, the Attorney General of the State of Texas, discussing that memo. We normally do not consider documents that are attached to briefs for the truth of the matters contained within them.[1] But of course this Court may always take judicial notice of laws because laws are printed and promulgated in official gov-

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[1] *See Ex parte Simpson,* 136 S.W.3d 660, 668 (Tex.Crim.App. 2004) ("There is no provision in article 11.071 that permits either the State or the habeas applicant to submit original evidence directly to this Court. Evidentiary affidavits, letters, transcripts, or other documents relating to a habeas claim should not be attached to motions or briefs, and they shall not, and will not, be considered by this Court.") *Surety Ins. Co. of Cal. v. State,* 556 S.W.2d 329, 331 (Tex.Crim.App.1977) (exhibits attached to a brief cannot be considered "as these papers are not part of the official record"); *Ex parte Schoen,* 460 S.W.2d 923, 925 (Tex.Crim.App.1970) (supporting papers pertaining to an extradition cause, attached to a document in the appellate record, are not properly before the court because they were not introduced during the habeas proceeding).

ernment volumes and are readily available to any interested member of the public.[2]

Presidential proclamations and Executive orders, except those which do not have general applicability and legal effect or are effective only against federal agencies, are drafted, reviewed, and promulgated in a specific manner and then published in the Federal Register.[3]

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[2] *See Plaster v. State,* 567 S.W.2d 500, 502 (Tex.Crim.App. 1978); *Mosqueda v. Albright Transfer & Storage Co.,* 320 S.W.2d 867, 876 (Tex.Civ.App.-Fort Worth 1959, writ ref'd n.r.e.) (op. on reh'g). In *Mosqueda,* the court of civil appeals suggested that Texas courts

> must take judicial notice of the laws of the United States, including all the public acts and resolutions of Congress and proclamations of the president thereunder. Administrative rules adopted by boards, departments, and commissions pursuant to federal statutes are also matters of judicial knowledge. When such regulations are published in the Federal Register a federal statute provides that their contents shall be judicially noticed.

Id. (quoting Roy R. Ray & William F. Young, Jr., Texas Law of Evidence Civil and Criminal § 172 (2d ed.1956)).

[3] *See generally* 44 U.S.C. § 1505(a)(1) ("Documents having general applicability and legal effect means any document issued under proper authority prescribing a penalty or course of conduct, conferring a right, privilege, authority, or immunity, or imposing an obligation, and relevant or applicable to the general public, members of a class, or persons in a locality, as distinguished from named individuals or organizations . . ."). The Presidential Executive Order of September 9, 1987, stipulates the manner in which proposed Executive orders and proclamations are to be prepared, printed, and published: these requirements include:

> (g) Proclamations issued by the President shall conclude with the following described recitation—
>
> "IN WITNESS WHEREOF, I have hereunto set my hand this _____ day of _____, in the year of our lord, and

(*footnote continued*)

This memo is not written in the manner prescribed for Presidential Proclamations or Executive Orders. It is written in a private memo style. I am unable to find a copy of this memo published in the Federal Register. In fact, the only public publication of this memo that I can find is on the White House Press Release Internet website.[4] I cannot accept the proposition that binding federal

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> of the Independence of the United States of America, the _____.
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> . . .
>
> Sec. 2. Routing and approval of drafts.
>
> (a) A proposed Executive order or proclamation shall first be submitted, with seven copies thereof, to the Director of the Office of Management and Budget, together with a letter, signed by the head or other properly authorized officer of the originating Federal agency, explaining the nature, purpose, background, and effect of the proposed Executive order or proclamation and its relationship, if any, to pertinent laws and other Executive orders or proclamations.
>
> (b) If the Director of the Office of Management and Budget approves the proposed Executive order or proclamation, he shall transmit it to the Attorney General for his consideration as to both form and legality.
>
> . . . .
>
> Sec. 3. Routing and certification of originals and copies. (a) If the order or proclamation is signed by the President, the original and two copies thereof shall be forwarded to the Director of the Office of the Federal Register for publication in the Federal Register.
>
> (b) The Office of the Federal Register shall cause to be placed upon the copies of all Executive orders and proclamations forwarded as provided in subsection (a) of this section the following notation, to be signed by the Director or by some person authorized by him to sign such notation: "Certified to be a true copy of the original."

[4] http://www.whitehouse.g ov/news/releases/2005/02/20050228-18. html.

law, either through Congressional enactment or Executive Order, can be accomplished through a Presidential press release of a private memorandum directed to the Attorney General. Thus, I cannot accept the premise that the President's memo to his Attorney General is federal law that could supercede and obviate a clear and explicit Texas statute.[5] Thus, I find it unnecessary to undertake a separation of powers analysis as does the majority.

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[5] Ironically, the very law that the President's memo would supercede, article 11.071 of the Texas Code of Criminal Procedure, is a legislative enactment that the President, while Governor of the State of Texas, signed into law on June 7, 1995. *See* "The Habeas Corpus Reform Act," 74th Leg., R.S., ch.319, § 1, 1995 Tex. Gen. Laws 2764.

Constitutional, Treaty, and Statutory Provisions Involved

Constitution of the United States of America

Article II, Section 1, Clause 1

The executive Power shall be vested in a President of the United States of America. . . .

Article II, Section 2, Clause 2

He [the President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

Article II, Section 3

He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

Art. VI, Clause 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, *opened for signature* April 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 487

Article I

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

U.N. Charter, *opened for signature* June 26, 1945, T.S. No. 993, 59 Stat. 1031

Article 94(1)

Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.

Statute of the International Court of Justice, *opened for signature* June 26, 1945, T.S. No. 993, 59 Stat. 1055

Article 36(1)

The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.

Article 59

The decision of the Court has no binding force except between the parties and in respect of that particular case.

Article 60

The judgment is final and without appeal. In the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party.

United States Code

22 U.S.C. § 287(a)

The President, by and with the advice and consent of the Senate, shall appoint a representative of the United States to the United Nations who shall have the rank and status of Ambassador Extraordinary and Plenipotentiary and shall hold office at the pleasure of the President. Such representative shall represent the United States in the Security Council of the United Nations and may serve ex officio as representative of the United States in any organ, commission, or other body of the United Nations other than specialized agencies of the United Nations, and shall perform such other functions in connection with the participation of the United States in the

United Nations as the President may, from time to time, direct.

22 U.S.C. § 287a

The representatives provided for in section 287 of this title, when representing the United States in the respective organs and agencies of the United Nations, shall, at all times, act in accordance with the instructions of the President transmitted by the Secretary of State unless other means of transmission is directed by the President, and such representatives shall, in accordance with such instructions, cast any and all votes under the Charter of the United Nations.

22 U.S.C. § 1732

Whenever it is made known to the President that any citizen of the United States has been unjustly deprived of his liberty by or under the authority of any foreign government, it shall be the duty of the President forthwith to demand of that government the reasons of such imprisonment; and if it appears to be wrongful and in violation of the rights of American citizenship, the President shall forthwith demand the release of such citizen, and if the release so demanded is unreasonably delayed or refused, the President shall use such means, not amounting to acts of war and not otherwise prohibited by law, as he may think necessary and proper to obtain or effectuate the release; and all the facts and proceedings relative thereto shall as soon as practicable be communicated by the President to Congress.

22 U.S.C. § 4802(a)(1)(D)

(1) The Secretary of State shall develop and implement (in consultation with the heads of other Federal

agencies having personnel or missions abroad where appropriate and within the scope of the resources made available) policies and programs, including funding levels and standards, to provide for the security of United States Government operations of a diplomatic nature and foreign government operations of a diplomatic nature in the United States. Such policies and programs shall include—

. . .

(D) protection of foreign missions, international organizations, and foreign officials and other foreign persons in the United States, as authorized by law.

Texas Code of Criminal Procedure

Article 11.071, § 5(a), (d)-(e)

(a) If a subsequent application for a writ of habeas corpus is filed after filing an initial application, a court may not consider the merits of or grant relief based on the subsequent application unless the application contains sufficient specific facts establishing that:

> (1) the current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application filed under this article or Article 11.07 because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application;
>
> (2) by a preponderance of the evidence, but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt; or

(3) by clear and convincing evidence, but for a violation of the United States Constitution no rational juror would have answered in the state's favor one or more of the special issues that were submitted to the jury in the applicant's trial under Article 37.071 or 37.0711.

. . .

(d) For purposes of Subsection (a)(1), a legal basis of a claim is unavailable on or before a date described by Subsection (a)(1) if the legal basis 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.

(e) For purposes of Subsection (a)(1), a factual basis of a claim is unavailable on or before a date described by Subsection (a)(1) if the factual basis was not ascertainable through the exercise of reasonable diligence on or before that date.

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.

* *

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.

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

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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,

represented by

H.E. Mr. Juan Manuel Gómez-Robledo, Ambassador, former Legal Adviser, Ministry of Foreign Affairs, Mexico City,

as Agent;

H.E. Mr. Santiago Oñate, Ambassador of Mexico to the Kingdom of the Netherlands,

as Agent (until 12 February 2004);

Mr. Arturo A. Dager, Legal Adviser, Ministry of Foreign Affairs, Mexico City,

Ms María del Refugio González Domínguez, Chief, Legal Co-ordination Unit, Ministry of Foreign Affairs, Mexico City,

as Agents (from 2 March 2004);

H.E. Ms Sandra Fuentes Berain, Ambassador-Designate of Mexico to the Kingdom of the Netherlands,

as Agent (from 17 March 2004);

Mr. Pierre-Marie Dupuy, Professor of Public International Law at the University of Paris II (Panthéon-Assas) and at the European University Institute, Florence,

Mr. Donald Francis Donovan, Attorney at Law, Debevoise & Plimpton, New York,

Ms Sandra L. Babcock, Attorney at Law, Director of the Mexican Capital Legal Assistance Programme,

Mr. Carlos Bernal, Attorney at Law, Noriega y Escobedo, and Chairman of the Commission on International Law at the Mexican Bar Association, Mexico City,

Ms Katherine Birmingham Wilmore, Attorney at Law, Debevoise & Plimpton, London,

Mr. Dietmar W. Prager, Attorney at Law, Debevoise & Plimpton, New York,

Ms Socorro Flores Liera, Chief of Staff, Under-Secretariat for Global Affairs and Human Rights, Ministry of Foreign Affairs, Mexico City,

Mr. Víctor Manuel Uribe Aviña, Head of the International Litigation Section, Legal Adviser's Office, Ministry of Foreign Affairs, Mexico City,

as Counsellors and Advocates;

Mr. Erasmo A. Lara Cabrera, Head of the International Law Section, Legal Adviser's Office, Ministry of Foreign Affairs, Mexico City,

Ms Natalie Klein, Attorney at Law, Debevoise & Plimpton, New York,

Ms Catherine Amirfar, Attorney at Law, Debevoise & Plimpton, New York,

Mr. Thomas Bollyky, Attorney at Law, Debevoise & Plimpton, New York,

Ms Cristina Hoss, Research Fellow at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg,

Mr. Mark Warren, International Law Researcher, Ottawa,

as Advisers;

Mr. Michel L'Enfant, Debevoise & Plimpton, Paris,

as Assistant,

and

the United States of America,

represented by

The Honourable William H. Taft, IV, Legal Adviser, United States Department of State,

as Agent;

Mr. James H. Thessin, Principal Deputy Legal Adviser, United States Department of State,

as Co-Agent;

Ms Catherine W. Brown, Assistant Legal Adviser for Consular Affairs, United States Department of State,

Mr. D. Stephen Mathias, Assistant Legal Adviser for United Nations Affairs, United States Department of State,

Mr. Patrick F. Philbin, Associate Deputy Attorney General, United States Department of Justice,

Mr. John Byron Sandage, Attorney-Adviser for United Nations Affairs, United States Department of State,

Mr. Thomas Weigend, Professor of Law and Director of the Institute of Foreign and International Criminal Law, University of Cologne,

Ms Elisabeth Zoller, Professor of Public Law, University of Paris II (Panthéon-Assas),

as Counsel and Advocates;

Mr. Jacob Katz Cogan, Attorney-Adviser for United Nations Affairs, United States Department of State,

Ms Sara Criscitelli, Member of the Bar of the State of New York,

Mr. Robert J. Erickson, Principal Deputy Chief, Criminal Appellate Section, United States Department of Justice,

Mr. Noel J. Francisco, Deputy Assistant Attorney General, Office of Legal Counsel, United States Department of Justice,

Mr. Steven Hill, Attorney-Adviser for Economic and Business Affairs, United States Department of State,

Mr. Clifton M. Johnson, Legal Counsellor, United States Embassy, The Hague,

Mr. David A. Kaye, Deputy Legal Counsellor, United States Embassy, The Hague,

Mr. Peter W. Mason, Attorney-Adviser for Consular Affairs, United States Department of State,

as Administrative Staff,

THE COURT,

composed as above,

after deliberation,

delivers the following Judgment:

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 therefor 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.

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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) 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) 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) 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 convic-

tions 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, para-

graph 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.

* *

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 para-

graph 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.

* *

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. Mexicoresponds 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 Con-

vention. It lays down certain standards to be observed by all States parties, with a view to the "unimpeded conduct of consular relations", which, as the Court observed in 1979, is important in present-day international law "in promoting the development of friendly relations among nations, and ensuring protection and assistance for aliens resident in the territories of other States" (*United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran), Order of 15 December 1979, I.C.J. Reports 1979*, pp. 19-20, para. 40). Even if it were shown, therefore, that Mexico's practice as regards the application of Article 36 was not beyond reproach, this would not constitute a ground of objection to the admissibility of Mexico's claim. The fifth objection of the United States to admissibility cannot therefore be upheld.

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

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Article 36, paragraph 1

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

> "the United States of America, in arresting, detaining, trying, convicting, and sentencing the 52 Mex-

ican 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 disagree as 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 defen-

dants 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 con-

sidered 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, how-

ever, 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 rec-

ognized 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 Mex-

ico 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 convic-

tion 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 process within the United States criminal justice system. It must, however, point out that what is at issue in the present case is not whether executive clemency as an institution is or is not an integral part of the "existing laws and regulations of the United States", but whether the clemency process as practised within the criminal justice systems of different states in the United States can, in and of itself, qualify as an appropriate means for undertaking the effective "review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention", as the Court prescribed in the *LaGrand* Judgment (*I.C.J. Reports 2001*, p. 514, para. 125).

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

to take due account of the violation of the rights set forth in the Vienna Convention, as has occurred in the case of the three Mexican nationals referred to in paragraph 114 above.

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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 nonretroactivity 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 num-

ber 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.

* *

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 Con-

vention, of the conviction and sentences of Mr. César Roberto Fierro Reyna, Mr. Roberto Moreno Ramos and Mr. Osvaldo Torres Aguilera, after the violations referred to in subparagraph (4) above had been established in respect of those individuals, the United States of America breached the obligations incumbent upon it under Article 36, paragraph 2, of the Convention;

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

AGAINST: *Judge* Parra-Aranguren;

(9) By fourteen votes to one,

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

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

AGAINST: *Judge* Parra-Aranguren;

(10) Unanimously,

Takes note of the commitment undertaken by the United States of America to ensure implementation of the specific measures adopted in performance of its obligations under Article 36, paragraph 1 *(b)*, of the Vienna Convention; and *finds* that this commitment must be

regarded as meeting the request by the United Mexican States for guarantees and assurances of non-repetition;

(11) Unanimously,

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

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

(Signed) SHI Jiuyong,
President.

(Signed) Philippe COUVREUR,
Registrar.

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

(Initialled) J.Y.S.

(Initialled) Ph.C.

THE WHITE HOUSE
WASHINGTON

February 28, 2005

MEMORANDUM FOR THE ATTORNEY GENERAL

SUBJECT: Compliance with the Decision of the International Court of Justice in *Avena*

The United States is a party to the Vienna Convention on Consular Relations (the "Convention") and the Convention's Optional Protocol Concerning the Compulsory Settlement of Disputes (Optional Protocol), which gives the International Court of Justice (ICJ) jurisdiction to decide disputes concerning the "interpretation and application" of the Convention.

I have determined, pursuant to the authority vested in me as President by the Constitution and the laws of the United States of America, that the United States will discharge its international obligations under the decision of the International Court of Justice in the *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America) (Avena),* 2004 ICJ 128 (Mar. 31), by having State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision.

(*signed*) GEORGE W. BUSH