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Public sitting

held on Tuesday 21 January 2003, at 3 p.m., at the Peace Palace,

President Guillaume presiding,

*in the case concerning Avena and other Mexican Nationals
(Mexico v. United States of America)*

VERBATIM RECORD

ANNÉE 2003

Audience publique

tenue le mardi 21 janvier 2003, à 15 heures, au Palais de la Paix,

sous la présidence de M. Guillaume, président,

*en l'affaire Avena et autres ressortissants mexicains
(Mexique c. Etats-Unis d'Amérique)*

COMPTE RENDU

Present: President Guillaume
 Vice-President Shi
 Judges Oda
 Ranjeva
 Herczegh
 Fleischhauer
 Koroma
 Vereshchetin
 Higgins
 Parra-Aranguren
 Kooijmans
 Rezek
 Al-Khasawneh
 Buergenthal
 Elaraby

 Registrar Couvreur

Présents : M. Guillaume, président
M. Shi, vice-président
MM. Oda
Ranjeva
Herczegh
Fleischhauer
Koroma
Vereshchetin
Mme Higgins
MM. Parra-Aranguren
Kooijmans
Rezek
Al-Khasawneh
Buergenthal
Elaraby, juges

M. Couvreur, greffier

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

as Agents, Counsellors and Advocates;

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Mr. Guillaume Michel, Deputy Director International Law, Ministry of Foreign Affairs,

Mr. Jorge Cicero, Ministry of Foreign Affairs,

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Le PRESIDENT : Veuillez vous asseoir. L'audience est ouverte pour le deuxième tour de plaidoirie dans l'affaire opposant les Etats-Unis du Mexique aux Etats-Unis d'Amérique et je vais immédiatement donner la parole à l'agent de la République des Etats-Unis du Mexique, l'ambassadeur Gómez-Robledo.

M. GÓMEZ-ROBLEDO : Merci Monsieur le président. Monsieur le président, Madame et Messieurs les Membres de la Cour, à l'issue du premier tour de plaidoirie concernant la demande du Mexique en indication de mesures conservatoires et préalablement aux réponses ponctuelles que ma délégation fera eu égard aux arguments avancés par les Etats-Unis, je voudrais faire quelques remarques de nature préliminaire.

Premièrement, ce que nous venons d'entendre ce matin de la part des Etats-Unis est précisément, Monsieur le président, ce que nous avons dû endurer ces dernières années, au cours desquelles nos droits, en vertu de la convention de Vienne, ont été systématiquement bafoués. Ces droits sont non seulement ceux de nos ressortissants mais également ceux du Mexique, tout autant dans l'exercice de la protection consulaire que, le cas échéant, pour ce qui est de la protection diplomatique. D'après cet argumentatif, le Mexique demande des mesures conservatoires pour la protection de droits présumés inexistantes, non pas parce qu'ils ne sont pas expressément visés par la convention de Vienne, mais en raison de leur violation par les Etats-Unis. Et c'est ce que nous revendiquons dans cette procédure. Les Etats-Unis prétendent à tort que le Mexique demande que les mesures conservatoires soient une forme d'ingérence dans le système de justice pénale de leur pays, alors que ce que nous exigeons, en revanche, c'est que ce système fonctionne de manière adéquate dans le plein respect des obligations internationales des Etats-Unis et des droits que cette convention reconnaît au Mexique, ainsi que la Cour l'a dit dans l'arrêt *LaGrand*.

Deuxièmement, en l'absence de véritables arguments juridiques pour s'opposer à la demande du Mexique en indication de mesures conservatoires, les Etats-Unis ont exécuté sommairement les droits que nous sommes venus faire valoir. Face à la force de nos arguments et aux précédents invoqués, on préfère sous-estimer une requête dont la seule raison d'être est le respect des traités et leur application de bonne foi. La requête mexicaine est jugée exagérée, prématurée, spéculative, motivée par la recherche d'un but politique, ce qui ne saurait nous atteindre, car c'est plutôt à la

Cour, Monsieur le président, que l'on manque de respect. Songez, Monsieur le président, la situation à laquelle nous ferions face si le Mexique ou un quelconque autre pays avait dans ses prisons cinquante et un ressortissants des Etats-Unis condamnés à la peine de mort après que les consulats des Etats-Unis eurent subi la violation de leurs droits en vertu de la convention de Vienne, droits qui ont été par ailleurs invoqués par les Etats-Unis dans la très fameuse affaire du *Personnel diplomatique et consulaire des Etats-Unis à Téhéran*. Dans un tel cas, et si les Etats-Unis décidaient de résoudre le différend par le biais des moyens pacifiques du règlement des différends, les Etats-Unis, vraisemblablement, feraient valoir les mêmes arguments, ils demanderaient qu'aucun de ces ressortissants ne soit exécuté en attendant que la Cour ait pu trancher sur le fond de l'affaire.

Troisièmement, le Mexique prie respectueusement la Cour, Monsieur le président, de prendre en considération et dans toute son ampleur tout ce que les Etats-Unis ont avancé ce matin. Tout comme le ton de la dernière intervention des Etats-Unis. La condescendance manifeste envers nos arguments, qui n'est qu'une forme cachée du mépris, la distorsion de nos propos est quelque chose qui ne nous surprend pas. Malheureusement cette attitude vient perturber une audience qui a pour but de soumettre une question grave à la considération de cette Cour. Le Mexique n'aurait jamais imaginé une attitude pareille lors de sa première saisine de la Cour internationale de Justice. Monsieur le président, avec tout le respect que le Mexique a pour la Cour, je me permets d'insister, il ne s'agit pas d'une affaire politique bien que celui-ci soit le sens que l'autre Partie ait voulu attribuer à notre requête et à notre demande en indication de mesures conservatoires. Il s'agit plutôt d'une affaire qui met en jeu le fondement même du droit international. Je l'ai dit ce matin, le principe *pacta sunt servanda* est le principe du règlement pacifique du différend ainsi que le respect dû à la dignité de la vie humaine.

Je vous remercie Monsieur le président et je vais demander avec votre permission à M^e Sandra Babcock de continuer la suite de nos arguments dans ce deuxième tour de plaidoirie. Merci, Monsieur le président.

Le PRESIDENT : Je vous remercie Monsieur l'ambassadeur et je donne maintenant la parole à M^e Sandra Babcock.

Ms BABCOCK: Mr. President, distinguished Members of the Court, good afternoon. I would like to respond to certain factual allegations that were raised by the United States in its presentation this morning.

First with regard to urgency. The United States makes much of the fact that no execution date has yet been set in the case of any Mexican national. But the United States never disputed and, in fact, cannot dispute that execution dates could be set at any time. Not only for Mr. Fierro or Mr. Moreno Ramos, but for several other Mexican nationals currently on death row. Let us take Texas as an example. Under Texas law, and I cite Article 43.141 of the Texas Code of Criminal Procedure, "a Texas court may schedule an execution date for any prisoner who has completed the state court appellate process". There are ten Mexican nationals currently in that posture. In other words, the Texas courts could set execution dates at any time for any of those ten Texas prisoners. The United States has not and cannot dispute this fact.

The United States likewise cannot and did not dispute that the Texas courts could set an execution date at any time for Mr. Fierro and Mr. Moreno Ramos. Again, if that date were set today in the case of Mr. Fierro, it would be set for a time, or could be set for a time, that was 30 days from today's date.

The PRESIDENT: May I ask you to speak a little bit more slowly for the interpreters, please.

Ms BABCOCK: I am sorry.

In the case of Mr. Moreno Ramos, the execution date, if it were to be set today, and it could be set today, could be set for 91 days from today's date. That would bring us to 22 April 2003. So, although I am tempted to quarrel with the United States remarks regarding the imminence of the execution dates in the cases that are listed in Mexico's Application, I will not, because there is really no need. The United States has conceded, exactly as Mexico stated in its Application and request for provisional measures, that Mr. Fierro, Mr. Moreno Ramos and Mr. Torres are in the final stages of the appellate process. And, as the United States is well aware, the United States Supreme Court has entire discretion, unfettered discretion, to issue a decision at the time it chooses, and it has complete discretion and it is overwhelmingly likely that that decision will be to deny

review. Indeed the only difference between the cases of Mr. Moreno Ramos and Mr. Fierro and the cases of Mr. Breard and Mr. LaGrand is that no execution date has yet been set.

The United States suggested that in order for provisional measures to be truly urgent, two preconditions should be met: (1) that there should be an execution date already scheduled, and (2) that there should be no possibility for review and reconsideration. You have all heard the United States definition of review and reconsideration. According to the United States, review and reconsideration may be provided by clemency authorities who, after all legal avenues have been exhausted, will allow a prisoner to beg for mercy and for an act of grace by which their sentence could be commuted.

Let us assume an execution date is set today for Mr. Fierro or for any of the other Mexican nationals who are the subject of this Application. If Mexico were then to come to this Court seeking provisional measures then, according to Ms Brown, the request would still be premature because the Texas Board of Pardons and Paroles and the Texas Governor had not yet reviewed the violation of Article 36. This scenario conveniently ignores one very important fact. That is that clemency decisions in all jurisdictions, without exception, are rendered on the eve of execution. In Texas, decisions are often made within one half hour of the actual execution. I had one case in which the decision came ten minutes before the execution. In the case of Mr. Breard, as you may recall, the decision also came very late by the Governor of Virginia.

So, if we follow the United States argument to its logical conclusion, the United States would have Mexico file an application for provisional measures on the eve of one of its nationals' execution, precisely the situation about which the United States complained so bitterly in the cases of Mr. Breard and Mr. LaGrand.

Even if we take only the first of the two preconditions identified by the United States, the setting of an execution date, Mexico would still be in precisely the same posture as Paraguay and Germany were in the previous two cases. If an execution date were set today for Mr. Fierro and if Mexico had waited, presumably the Court could set a hearing within a few days and would act as expeditiously as you possibly could to perhaps issue an order of provisional measures. Even if the Court acted as expeditiously as possible, we would still be coming back in United States courts in the exact same posture as the petitioners in *Breard* and *LaGrand*. And, as Mr. Donovan mentioned

this morning, the United States Supreme Court expresses its extreme dissatisfaction with the lateness of the petitioners' appeals in those cases. In addition, the United States complained both before this Court and also faulted the petitioners in those cases and the governments for the tardiness of their applications and requests for provisional measures here.

I would like to turn now to the United States argument that under *LaGrand*, review and reconsideration means nothing more than an opportunity to file a piece of paper with a clemency authority in which the petitioner begs for mercy. Mr. President, Texas is not Illinois and Governor Perry is not Governor Ryan. Based on Mexico's recent experiences in the cases of Mr. Flores and Mr. Suarez Medina and based upon our knowledge of the Texas Board's practices, we can say with absolute confidence that no foreign national sentenced to death in the state of Texas will receive a commutation based upon an Article 36 violation while this case is pending before the Court.

It is true that Mexico disagrees with the State Department regarding the decision of the Texas Board to deny commutation for Mr. Suarez Medina. We have made that abundantly clear and it is the heart of one of the disputes between Mexico and the United States in these proceedings. But Mexico is also confident that under any reasonable interpretation of this Court's Judgment in *LaGrand*, that the standardless, secretive and unreviewable process that is called clemency cannot and does not satisfy this Court's mandate in that case. We base that conclusion, in part, on the facts of *LaGrand* itself.

In the *LaGrand* case, this Court was fully aware that each of the LaGrand brothers had received a full clemency hearing before the Arizona Pardon and Parole Board and during those hearings, each of the LaGrand brothers had the opportunity to present evidence. German diplomats were there and testified. Other witnesses testified regarding the violation of Article 36 in that case, and Germany's belief as to the effect of that violation in those two individual cases. In other words, the LaGrand brothers themselves each received the review and reconsideration that, according to the United States, is all that is required under the *LaGrand* Judgment itself. But with full awareness of those facts, this Court nevertheless held in *LaGrand*, that the United States had violated its obligations to the LaGrand brothers and to Germany and had failed to give full effect to the purposes for which Article 36 was intended.

Mr. President, I would like at this time to ask you to call upon my colleague, Mr. Donovan.

Le PRESIDENT : Je vous remercie, Maître. Je donne maintenant la parole à M^c Donald Donovan.

Mr. DONOVAN: Thank you, Mr. President.

There were two themes in the United States presentation this morning, and I would like to make some initial comments on those themes that may well inform my entire presentation here this afternoon. And if I may, I will start with those initial comments.

First, it is plain that the United States places great store by the sentence in the *LaGrand* Judgment that talks about review and reconsideration. Indeed, if you listened to the United States explanations of why, as the United States put it, each of the four requirements, or Mexico's supposed failure to meet each of the four requirements, provided an independent and separate basis for denying Mexico's Request in the United States submissions. If you uncover the reasoning for each of those arguments it came down to a single proposition, and that is that the Vienna Convention entitles Mexico only to review and reconsideration, and that review and reconsideration equals only the ability to request clemency. Although, the arguments were cast in terms of authority to ground Mexico's applications and the rights it asserted— a failure to demonstrate irreparable injury, a failure to demonstrate urgency— indeed, there were even references, despite the initial statement of the United States that it did not contest jurisdiction at this time, to a failure to come within the Court's jurisdiction. But, notwithstanding those myriad supposed grounds, the bottom line in each case was the United States view of what this Court meant in *LaGrand* when it referred to review and reconsideration.

Now, Mexico fundamentally disagrees with that view of the *LaGrand* decision and the rights that the Vienna Convention confers. As Ms Babcock said, Mexico does not believe that the Vienna Convention affords nationals deprived of their rights an opportunity to beg for mercy. What the Vienna Convention affords is a right to consular notification under the circumstances there specified, and a right that municipal law give full effect to the purposes for which the Article 46 rights are set forth.

The second theme is a distinction between result and means. This theme infused both the presentation with respect to the Vienna Convention and the presentation with respect to Mexico's entitlement to an order under Article 41 of this Court's Statute. On this score, and as I will explain more fully, on both prongs of the argument, Mexico fundamentally disagrees with the implicit suggestion in the United States submissions that a choice of means may swallow the result required by the governing international instrument. We would respectfully submit that the United States did not rigorously distinguish — as I hope we will do in the following presentation — between the result dictated by international law and the international obligations that a State party may have undertaken and the means pursuant to its internal law by which that State party may choose to fulfil the obligation, that is, to achieve the result it has undertaken to achieve.

I respectfully suggest that it is the province of international law to dictate the result once the party has undertaken to *achieve* that result and the province of internal law to provide the means. But I think if we keep that distinction very clear it will help in understanding both the Parties' differences as to the substance of rights and issues here, but Mexico's clear entitlement to the provisional measures it seeks.

Given the United States emphasis on review and reconsideration, I would like to take a moment to review the genesis of the phrase and the course of the proceedings in Paraguay and Germany. And I hope not to belabour it because I know that the Court is well familiar with those proceedings and both Parties have addressed them this morning. But to be brief, Paraguay of course sought an order of provisional measures founded on an application arising from the Vienna Convention on Consular Relations in order to halt an execution. The execution went forward notwithstanding the indication of provisional measures, Paraguay filed a Memorial on the merits, and then shortly thereafter withdrew the case from the Court's list. And therefore, obviously, the Court had no occasion to address either the substantive claims or the claims that Paraguay made as to the binding character of provisional measures.

LaGrand proceeded in a similar sequence of events. Again, an execution went forward notwithstanding the indication of provisional measures. But unlike the Paraguay case, the Germany case went to judgment on the merits. There the Court reached several important holdings with respect to the Vienna Convention. First, the Court concluded that the United States failure to

notify the German nationals of their consular notification rights constituted a breach of Article 36 of the Vienna Convention, and it also held in the context of that holding that prejudice or an effect on the proceedings was no element of the violation. Second, the Court concluded that paragraph 1 (b) of Article 36 created an individual right to consular notification of the detained national, and did not simply accord rights to the sending State. And finally, the Court concluded that in the circumstances of the case the procedural default doctrine of United States law prevented full effect from being given to the rights afforded by the Vienna Convention in violation of paragraph 2 of Article 36.

The *LaGrand* Judgment resolved many of the issues that had divided the parties on the interpretation of the Vienna Convention, the obligations it imposed and the remedies available for breaches. But not all. Because — I should note, of course, that each of the issues that the *LaGrand* Judgment *did* determine, as to the substance of rights afforded by the Vienna Convention and as to the binding character of provisional measures, were resolved in favour of the positions first advanced by Paraguay and then by Germany — but because in the *LaGrand* case the executed national was obviously no longer present, the Court had no occasion to consider the full range of remedies that might be available, or indeed the remedies that would be available in the case of a natural violation in which the national was still alive. The Court will need to reach those issues on Mexico's Application.

But for purposes again of the United States submission this morning, it might be useful to examine precisely where *LaGrand* left off and the context in which this Court held in *LaGrand* or made the reference it did to review and reconsideration, because this Court in *LaGrand* made that observation specifically in the context of Germany's request for guarantees of non-repetition. The paragraph, as the United States explained this morning, is paragraph 125, and it is indeed an important observation by this Court, and indeed an important holding of this Court. The Court started that paragraph by stating: "The Court observes in this regard that it can determine the existence of a violation of an international obligation. If necessary, it can also hold that a domestic law has been the cause of this violation." It then went on to observe, with respect to the procedural default doctrine, that it had held that in the circumstances of that case the procedural default doctrine had indeed violated the United States obligations, as I mentioned. It then, in the context of

Germany's request for guarantee, rejected the United States position that apology would suffice as a remedy.

That was a position that the United States advanced: that it was sufficient in these cases simply to apologize and that that was, as the United States acknowledged this morning, the United States position as to the remedy appropriate. It specifically said that an apology would not suffice, but that instead, in the case of such a conviction and sentence — that is one that imposed severe punishment or prolonged detention — 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. And then, of course, the Court continued “[t]his obligation can be carried out in various ways. The choice of means must be left to the United States”. But the “obligation”, of course, was defined by the Court.

Now, as I said, the Court had no reason to elaborate in that context on the meaning of review and reconsideration. But, surely, one thing the Court could not have meant, was that the choice of means, which it, of course, readily acceded to the United States, could swallow the obligation imposed by the Vienna Convention in the first place as to which it just had found the United States had committed a violation. So the result remains just as the Vienna Convention requires: consular notification and a requirement that municipal law permit full effect be given to the rights in the Convention.

Just as this Court held that in that case the procedural default doctrine violated international law, and an apology was not a sufficient remedy for that violation, it surely has the authority in this case to hold that the procedural default doctrine still violates international law and that solely discretionary completely standardless review that is not based on legal right, but on mere discretion, is also not a sufficient remedy under the Convention, and that, Mr. President, is precisely what Mexico contends.

By leaving the choice of means by which to reach the result to the United States, this Court did not leave it to the United States to redefine the result — that is, to redefine the international obligation — it did not abdicate its responsibility to adjudicate rights under international law, and it did not disavow its authority to determine that the means now employed are now supposed by the

United States to meet its obligations were also insufficient just as the apology that the United States previously supposed sufficed did not.

So, as should hopefully now be clear, in Mexico's view, *LaGrand* does not stand for the proposition that the United States supposes. Now, of course, the position that the United States takes here is consistent; as the Court now has before it the letters sent to the Clemency Board and to the Governor, also give the United States view of what review and reconsideration means; and I have also referred to the state of the law, which the United States delegation is well familiar with in the United States in the courts of appeal with respect to what kind of remedies the Vienna Convention affords.

Now I have just referred to this fundamental disagreement or the fundamental differences about what the Vienna Convention affords, let alone the underlying substantive rights; of course, that is what disputes are made of; that is why this Court is here; that is why the Parties are here. So let me review where the existence of that dispute and the competing obligations leave us with respect to the requirements that this Court has indicated must be met in order to issue provisional measures, and the United States position as to Mexico's showing on those requirements.

First, the United States has advised the Court that it will not contest the Court's jurisdiction on this request for provisional measures. If it had, of course, the difference of views that I have just explained would reinforce — if any reinforcement were needed — that there is a fundamental dispute between the Parties about the obligations imposed by the Vienna Convention.

With respect to the first requirement cited by the United States, that was that the request for provisional measures arise from the rights asserted in the Application. I think it is fair to say that again the United States position on that requirement comes down to the argument that Mexico's case does not arise out of the Vienna Convention, because Mexico does not have the rights it asserts. Indeed, as I mentioned, the United States in the context of this part of the argument refers several times to jurisdiction. But that is not the provenance of provisional measures, it is not the point of provisional measures to resolve the ultimate dispute on the merits. If there is any lesson that one draws from the Court's jurisprudence on provisional measures, it is that the whole point is to preserve rights provisionally, not to determine them finally. So, with the greatest respect, there

can be no question that Mexico's rights arise out of the Convention, or that Mexico's claims arise out of the Convention and that it satisfies the first requirement that this Court has set forth.

I move therefore to the second requirement: irreparable injury. The United States does not contest that the execution of this sending State's national would constitute irreparable injury. What the United States does instead, is attempt to redefine the irreparable injury at risk here. And how does it redefine irreparable injury at risk? It simply repeats again its supposition about what the Court meant by review and reconsideration; essentially asks the Court to adopt that view; tells the Court then that, of course, if the United States is right about what it means, then it has no rights that could be irreparably injured, and therefore it has not met the second test. Again, I respectfully suggest that that argument suffers from the same fatal flaw as its argument as to the first request.

And it may be useful here to refer to the reference in the last part of the United States argument to the Court's reasoning in both the *Nuclear Tests* case and the *Great Belt* case, which the United States suggests might provide some guidance in the consideration of this Application. Now, on the United States own account, of course, in the *Nuclear Tests* case, the Court found it unnecessary to indicate provisional measures, France made an authoritative pronouncement that it would no longer conduct the atmosphere tests that were objected to. And in the *Great Belt* case, the United States pointed out that the Court found it unnecessary to indicate provisional measures because Denmark said that it would not obstruct the passage and therefore met directly the object of the provisional measures. In both of those cases, in other words, the respondent State resisting an indication of provisional measures came in and said "we are not going to do what the object of the provisional measures is designed to prevent and therefore they are unnecessary". The equivalent here, would be if the United States stood at this podium and said "we are not going to execute any Mexican national before this Court renders judgment", that is the appropriate analogy. It is not sufficient for the United States to stand here and say, as it has several times this morning, "it is a sufficient assurance to this Court that we are going to provide review and reconsideration on *our* view of what that means between now and the time it renders judgment". That, of course, is — although the United States did not put it in these terms, I will — anticipating the judgment. Again therefore the United States argument with respect to irreparable injury depends fundamentally on

the conclusion that it is right about the ultimate issue in the case, or at least one of the ultimate issues in the case.

So I move to urgency. Ms Babcock has explained why, again on the United States own account, we are in precisely the same situation that this Court faced when it considered indicating provisional measures in response to Paraguay's and Germany's requests. There is really no difference between the Parties about the essential facts; there is no argument that there are 51 Mexican nationals under sentence of death; there is no argument about the normal operation of the United States criminal justice system; there is no argument that, in the normal course of events, additional Mexican nationals, such as the four already described to the Court this morning who had been executed over the last several years, will face execution. The United States, as I have just said, is not standing here and saying that it is going to take any steps to prevent those executions and, as Ms Babcock explained, effectively the only thing standing between the first few Mexican nationals and execution is either discretionary Supreme Court review — which this Court recognized in the Paraguay Order, occurs extremely rarely — or an application as a matter of grace for the Governor or Parole Board which is equally unlikely to happen. This Court's jurisprudence does not require a party seeking provisional measures to prove to a mathematical certainty that a given event is going to happen. As the *Great Belt* formulation said "highly likely" or "likely" — excuse me, I think the "highly" is not in there — "likely" to cause irreparable prejudice.

The Court's Order in Paraguay and in Germany conclusively demonstrates the urgency of the request here.

In light of the complaints that we have outlined this morning, both with respect to the United States position before this Court, in Paraguay and Germany, and the United States Supreme Court's observations when faced with applications arising out of both of those cases, I would respectfully suggest that it is a difficult case to make when the United States essentially complains that Mexico is here too soon.

The Court will appreciate the gravity of a request of a decision to file an application before this Court and a decision to request provisional measures. What the United States would ask the Court to require an Applicant to do is essentially to guess the right time to come. In Paraguay and Germany, the Applicants were too late. Now, Mexico is too early. According to the United States

the Applicant is supposed to guess the right time along a continuum of harm when it should come and put its case to this Court. The United States would have the applicant State play a guessing game as to when it is not too early and when it is not too late. And the stakes in that guessing game would be the irreparable prejudice represented by human life.

Mexico would respectfully suggest that that does not make any sense looked at from the standpoint of fairness to the requesting State. And it makes no sense whatsoever looked at from the standpoint of the sound administration of justice by this Court. The Applicants in both Paraguay and Germany were well aware of the burden under which they put the Court when they made decisions in those respective cases as to when discussions could no longer yield any possibility of an amicable resolution and therefore had to come to the Court. But it is, as the Court has said, extremely important that an Applicant come in good time. Here we would respectfully suggest that it is particularly important for the reasons that I outlined this morning and will not repeat.

But in any event, the guessing game to which I referred is not in any way dictated by the Court's jurisprudence. To the contrary, as we said this morning, the Court's orders on provisional measures give an objective determination of when the appropriate time to seek provisional measures is. That is the threat of irreparable injury. It is the threat of irreparable injury that determines when an Applicant may seek provisional measures from this Court. That is an objective determination, it is not a matter of discretion, it is not a matter of "is this about the right time", it is a question, as in the *Great Belt* formulation, "is there a threat of irreparable injury prior to the time this Court is likely to reach a decision on the merits". And we would respectfully suggest that that case has plainly been made by Ms Babcock's submissions.

I therefore move to the fourth point made by the United States, or the fourth basis in the United States submission, to reject Mexico's request for provisional measures. That is the disproportionate balance, or the imbalance, of which the United States complains in the impact on the rights of the two Parties.

The United States does not dispute Mexico's account of its side of the balance. That is, it does not dispute that the harm to Mexico if the provisional measures were not indicated in the form of loss of a human life would be dramatic and irremediable. But the United States argues instead, in very broad pronouncements, that there will be an inappropriate impact on the United States

criminal justice system. I paraphrase here — but I paraphrase as best I can — in saying that the United States referred to a compelling interest in the orderly administration of its criminal justice system and warned of an unwarranted intrusion by the Court in a way that would in the individual states justice systems, in ways that would disrupt and interfere with those proceedings.

But again I would respectfully focus the Court on what it is that Mexico is seeking. The only thing that is the subject of the request for provisional measures is the very final step. That is that no dates be set and no executions be held. The United States, with the greatest respect, did not identify any specific way in which any real harm would be done to a state's legitimate interest in pursuing its criminal justice system, in pursuing its law enforcement activity or doing anything else by merely delaying an execution which — as I pointed out this morning — if the United States prevails in its defence on Mexico's claims, would simply go forward in the same manner originally planned, once this Court concludes these proceedings.

In looking at the balance, the point of the balancing test is the concern that the Court not anticipate a judgment or prejudge the merits. And again, at the risk of repeating the same point, if we look at the impact on a failure to provide provisional measures here, that is the certain execution of some number of Mexican nationals before this Court renders its final judgment, and on the other side, the new delay in carrying out an execution, or some executions, by constituent states of the United States, there can be no question as to which of those results would anticipate the judgment.

I turn therefore to the form of the order that Mexico has requested.

The Court will no doubt have noticed some tension within the third submissions of the United States and between the third submissions and the fourth submissions and that is on the point of the relevance of internal law. On the one hand, Mr. Tessin and Professor Lauterpacht stated repeatedly a proposition — with which, of course, Mexico concurs — which is that the internal law of the United States and the ability of the federal government to secure compliance is not a matter relevant to Mexico's entitlement to an order of provisional measures. But at the same time, Mr. Tessin did talk about the complications of federalism and did suggest that in fact those complications were somehow a reason to repeat the formulation in the *Vienna Convention on Consular Relations (Paraguay v. United States of America)* and *LaGrand (Germany v. United States of America)* Orders, rather than to take on the simple formulation that Mexico requests, that

is, an obligation of result without regard to how the United States achieves that result and that result being to stop any executions. Mexico agrees that the internal law is irrelevant, but if the internal law is irrelevant there is only one result and that is an unequivocal affirmation of the obligation and there is no reason not to impose that obligation. That is the consequence of recognizing that the internal law of the United States plays no role. The way to respect the choice of means is to impose the result.

Perhaps in light of the United States submissions, some concluding observations or some concluding comments on the relationship, particularly as applied to this case, between international law and the internal law of any State might be appropriate. By recognizing the distinguished Members of this Court, I hesitate to make these observations but they are so squarely pertinent because the issue, as I said at the outset, infuses the United States submissions, both on the substance of rights imposed or granted by the Vienna Convention and on the right to an indication of provisional measures. Sometimes the fundamental becomes so familiar we lose sight of the underlying rationale and therefore I would like to start with a couple of basic propositions as to the status of international law and the relationship with international law, which might make clear why the best course for this Court is to require, eventually when we get to the merits, an obligation of result, but this point an obligation of result with respect to the indication of provisional measures. To start by stating the obvious, there is no physical impediment that the United States has identified to compliance with an order of this Court stated in the unequivocal terms that Mexico requests. There is no question about the ability to stop an execution. That is something that somebody has to affirmatively go do, certain steps have to be taken and then you execute an individual by whatever means the given state has authorized. The only thing we are talking about here, both with respect to the substance of obligation in the provisional measures are legal matters, that is, the operation of domestic law. Before this Court, the domestic law of any State, including the United States, is simply a fact. As the Permanent Court said in the *Certain German Interests in Polish Upper Silesia* case, from the standpoint of international law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activity of States, in the same manner as do legal decisions or administrative measures. And, of course, the Court confirmed that principle in the *LaGrand (Germany v. United States of America)* Judgment itself when it confirmed

that it can find by virtue of the operation of municipal law that a State has violated its international obligations.

Article 3 of the draft Articles on the Responsibility of States for Internationally Wrongful Acts unequivocally provides that the characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law. And of course, with respect to facts, there is no authority in international law to look at the facts of a particular State's internal law as providing circumstances that might preclude wrongfulness, as the draft Articles on State Responsibility would confirm. That, of course, would be fundamentally inconsistent with the Article 32 principle that I cited this morning.

So, in effect, if there are no physical impediments to compliance on either score and the fact of internal law cannot itself provide a circumstance precluding responsibility or barring performance, effectively what the United States is suggesting is that this Court take its internal law or treat its internal law on a par with international law. That raises precisely the spectre against which the United States warns. As soon as the Court assesses domestic law, in some way intertwined with international obligations, it intrudes within the State's internal law, not simply as a fact on which the Court judges compliance with international obligations but as law itself, and that simply cannot be. If the Court were to do so, of course, it would inject itself in precisely the manner the United States is concerned about. That is, it would become a quasi criminal court of appeal.

As a result, the way to vindicate this Court's mission as the pre-eminent international law court and at the same time to respect the province of international law, is to simply indicate a result. On the Application, the result that Mexico will request is constant notification in response to paragraph 1 of Article 36, full effect to those rights pursuant to paragraph 2 of Article 36. But that, as I have emphasized, is not before the Court at the moment. On this request, that matters in this case, if the Court is to respect the province of international law but at the same time vindicate its role in international law, what it should do is indicate to the United States that it shall not execute a Mexican national during the pendency of these proceedings and shall not set any execution dates for Mexican nationals during these proceedings.

Mr. President, again I appreciate the Court's patience and I call upon the Agent, Ambassador Gómez Robledo for the final submissions of Mexico.

Le PRESIDENT : Je vous remercie Maître, et je donne à nouveau la parole à l'agent des Etats-Unis du Mexique, l'ambassadeur Gómez-Robledo.

M. GÓMEZ-ROBLEDO : Je vous remercie. Monsieur le président, Madame et Messieurs les Membres de la Cour, au nom du Gouvernement des Etats-Unis du Mexique, agissant en son propre chef et dans l'exercice de son droit à accorder la protection diplomatique à ses ressortissants, je me permets de demander, en attendant que la Cour statue sur le fond de l'affaire, qu'elle indique :

- a) que le Gouvernement des Etats-Unis prenne toutes les mesures nécessaires afin qu'aucun ressortissant mexicain condamné à la peine de mort aux Etats-Unis ne soit exécuté et qu'aucune date d'exécution ne soit fixée;
- b) que le Gouvernement des Etats-Unis informe la Cour des actions prises conformément à l'ordonnance demandée;
- c) que le Gouvernement des Etats-Unis assure le Gouvernement du Mexique qu'aucune action ne soit prise qui pourrait résulter en un préjudice pour le Mexique et ses ressortissants en rapport avec toute décision que pourrait prendre cette Cour sur le fond de l'affaire.

Au vu de l'extrême gravité et du caractère immédiat des risques que les autorités des Etats-Unis exécutent un ressortissant mexicain en violation des obligations que les Etats-Unis ont envers le Mexique, mon gouvernement se permet de solliciter que la Cour considère cette requête comme étant de la plus grande urgence.

Monsieur le président, je ne voudrais pas terminer ma présentation sans évoquer ce soir la pensée de Martin Luther King dont on célébrait hier la mémoire. En effet, il a été beaucoup question aujourd'hui de la pertinence de notre requête et de notre demande en indication de mesures conservatoires, aussi bien quant au fond que quant au moment idoine pour l'introduire. Je répondrai aux questions soulevées avec les mots de Martin Luther King : «The time is always right to do what is right.» Je vous remercie Monsieur le président.

Le PRESIDENT : Je vous remercie, Monsieur l'agent. Et je donne la parole au juge Higgins qui souhaiterait poser une question.

Judge HIGGINS: Thank you, Mr. President. I have a question for the United States of America, which is the following: "Under what circumstances will the Legal Adviser of the State Department notify an appellant court rather than later notify a clemency body of the obligations of the United States consequent upon an admitted violation of Article 36 of the Vienna Convention? Is the matter simply one of timing?"

Le PRESIDENT : Je vous remercie, Madame. Ceci met un terme au deuxième tour de plaidoirie en ce qui concerne les Etats-Unis du Mexique. La Cour reprendra son audience à 18 heures pour le deuxième tour de plaidoirie des Etats-Unis d'Amérique. La séance est levée.

L'audience est levée à 16 h 10.
