

## 9. THE VIENNA CONVENTION ON CONSULAR RELATIONS: RECENT DEVELOPMENTS

By: William J. Aceves\*

### I. Introduction

For the third time in five years, proceedings have been filed against the United States in the International Court of Justice alleging violations of the Vienna Convention on Consular Relations (hereinafter “Vienna Convention”). *See* Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.) (Application Instituting Proceedings Submitted by the Government of the United Mexican States) (9 January 2003) (hereinafter “Avena Application”); LaGrand (Ger. v. U.S.) (Application Instituting Proceedings Submitted by the Federal Republic of Germany) (2 March 1999); Breard (Par. v. U.S.) (Application of the Government of Paraguay) (3 April 1998).<sup>1</sup> The Vienna Convention provides that foreign nationals must be notified of their right to communicate with consular officials when they are detained by law enforcement officials in member states.<sup>2</sup> Vienna Convention on Consular Relations, Apr. 24, 1963, 21 UST 77, 596 UNTS 261. In this instance, Mexico instituted proceedings against the United States, alleging violations of the Vienna Convention in 54 separate cases involving Mexican nationals who had been convicted and sentenced to death. And for the third time in five years, the International Court of Justice has issued a provisional measure order, indicating that the United States

must take all measures necessary to ensure that certain foreign nationals are not executed pending the final judgment of the Court. *See* Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.) (Provisional Measures Order) (5 February 2003) (hereinafter “Avena Order”); LaGrand (Ger. v. U.S.) (Provisional Measures Order) (3 March 1999) (hereinafter “LaGrand Order”); Breard (Par. v. U.S.) (Provisional Measures Order) (9 April 1998).

### II. Background on *Avena*

For decades, Mexico has provided consular assistance to its nationals traveling in the United States.<sup>3</sup> In 1942, for example, Mexico and the United States entered into a bilateral consular agreement “because of their geographic proximity and the frequent inter-state travel of their respective citizens.” Avena Application, *supra*, at para. 20. Mexico subsequently ratified the Vienna Convention in 1965 to supplement its bilateral consular agreements and to provide additional protection to Mexican nationals traveling abroad. In 1986, Mexico developed the Program of Legal Consultation and Defense for Mexicans Abroad to improve the work of its consular officials in representing the interests of Mexican nationals, particularly in legal proceedings. *Id.* at para. 22. In 2000, Mexico established the Mexican Capital Legal Assistance Program in the United States, which at the time was “the sole capital legal assistance programme established by a foreign Government in the United States.” *Id.* at para. 25. The Program works with consular officials and defense counsel in the United States to promote awareness and compliance with international norms, including the Vienna Convention. Through the Program, Mexico has intervened in approximately 110 cases at both the state and federal levels to protect the rights of Mexican nationals in capital cases. *Id.* at para. 26. In some of these cases, Mexican representatives assisted defense counsel in obtaining evidence or presenting arguments to

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\* William J. Aceves is Professor of Law and Director of the International Legal Studies Program at California Western School of Law. He is a Board member of the ACLU of San Diego and Imperial Counties. This article is based on an essay that will appear in the forthcoming issue of the *American Journal of International Law*.

the courts. In other cases, Mexico submitted diplomatic protests or requests for clemency to state and federal officials. To enhance these programs, Mexico adopted legislation and corresponding regulations in 2002 that “establish a comprehensive legal framework pursuant to which Mexican consular officials must intervene directly to protect the rights of Mexican nationals.” *Id.* at para. 21. Despite these actions, Mexico’s efforts to promote compliance with the Vienna Convention in the United States have met with limited success. Moreover, courts have declined to remedy violations of the Vienna Convention, even when such violations occurred in capital cases.

On January 9, 2003, Mexico filed an Application instituting proceedings against the United States before the International Court of Justice.<sup>4</sup> With the Application, it also filed a Request for Interim Measures of Protection. The Application based the jurisdiction of the Court on the Optional Protocol Concerning the Compulsory Settlement of Disputes (hereinafter “Optional Protocol”) that accompanies the Vienna Convention and which both countries have ratified. *See* Optional Protocol Concerning the Compulsory Settlement of Disputes, Apr. 24, 1963, 21 UST 325, 596 UNTS 487. The Optional Protocol provides that disputes arising out of the interpretation or application of the Vienna Convention shall lie within the compulsory jurisdiction of the Court. *Id.* at art. I.

The Mexican Application alleged that 54 Mexican nationals had been “arrested, detained, tried, convicted, and sentenced to death” in proceedings where the competent authorities failed to comply with their obligations under the Vienna Convention.<sup>5</sup> Avena Application, *supra*, at para. 1. These violations “prevented Mexico from exercising its rights and performing its consular functions pursuant to Articles 5 and 36, respectively, of the Vienna Convention.” *Id.* at para. 2. As a result of these violations, Mexico “had suffered

injuries in its own rights and in the form of injuries to its nationals.” *Id.*

Accordingly, Mexico asked the Court to adjudge and declare, *inter alia*, that the United States violated its international legal obligations to Mexico under the Vienna Convention. Mexico further requested the following remedies:

- (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.

*Id.* at para. 281.

Mexico also submitted a separate Request for the Indication of Provisional Measures of Protection. The Request

emphasized that three Mexican nationals — César Roberto Fierro Reyna, Roberto Moreno Ramos, and Osvaldo Torres Aguilera — faced executions in the next six months. In addition, the Request noted that other Mexican nationals could also face execution in the United States. Thus, the Request sought to ensure that no Mexican national would be executed until the Court determined Mexico’s claims on the merits.<sup>6</sup> According to Mexico, provisional measures were necessary to protect its interests pending a final ruling on the merits.

Unless the Court indicates provisional measures directing the United States to halt any executions of Mexican nationals until this Court’s decision on the merits of Mexico’s claims, the executive officials of constituent states of the United States will execute Messrs. Fierro, Moreno Ramos, Torres, or other Mexican nationals on death row before the Court has had the opportunity to consider those claims.

Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.) (Request for the Indication of Provisional Measures of Protection Submitted by the Government of the United Mexican States) (9 January 2003). Mexico argued that any prejudice suffered by the United States through the delay in such executions would be inconsequential. Mexico also argued that the Court’s prior decisions in *Breard* and *LaGrand*, both of which granted provisional measures to prevent executions involving claims of Vienna Convention violations, supported the indication of provisional measures in this case.

The Court held public hearings on January 21, 2003.<sup>7</sup> See Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.) (Verbatim Record) (21 January 2003) (hereinafter “Verbatim Record”). At the hearings, Mexico argued that the *LaGrand* judgment had not changed the likelihood that its nationals would receive stays of execution based

on Vienna Convention violations in the United States. Indeed, Mexico emphasized that three of its nationals – César Roberto Fierro Reyna, Roberto Moreno Ramos, and Osvaldo Torres Aguilera – were at risk of execution in the near future and that provisional measures were necessary. In response, the United States argued that none of the individuals named by Mexico were yet scheduled for execution. Moreover, the clemency power provided a sufficient mechanism for review and reconsideration of any Vienna Convention violation, thereby complying with the Court’s ruling in *LaGrand*. *Id.* at CR 2003/2, para. 3.10 (statement of Catherine Brown). In addition, the United States argued that approval of Mexico’s request “would constitute a wholly unprecedented and unwarranted interference with the sovereign rights of the United States . . . .” *Id.* at CR 2003/2, para. 2.9 (statement of Stephen Mathias).

### III. Provisional Measures in *Avena*

On February 5, 2003, the International Court of Justice announced its decision on the Request for the Indication of Provisional Measures.<sup>8</sup> As a preliminary matter, the Court indicated that both Mexico and the United States were parties to the Vienna Convention and the Optional Protocol, in each case without reservations. Thus, the Court determined that, *prima facie*, “it has jurisdiction under Article I of the aforesaid Optional Protocol to hear the Case.” *Avena* Order, *supra*, at para. 42.

The Court then considered whether a dispute existed between Mexico and the United States concerning the Vienna Convention, thereby implicating the Optional Protocol. At the public hearings, the United States had acknowledged that Mexican nationals were prosecuted and sentenced without being informed of their rights under the Vienna Convention. The United States had added, however, that the Court’s earlier decision in *LaGrand* allowed such violations to be

reviewed and reconsidered through the process of executive clemency and that this was a sufficient remedy for any breaches. In contrast, Mexico had argued that executive clemency was insufficient and did not comply with the obligations set forth in *LaGrand*. Based on these differences, the Court determined that there was, in fact, “a dispute between the Parties concerning the rights of Mexico and of its nationals regarding the remedies that must be provided in the event of a failure by the United States to comply with its obligations under Article 36, paragraph 1, of the Vienna Convention.” *Id.* at para. 46. The Court added, however, that the dispute could not be settled at this preliminary stage of the proceedings and must await the proceedings on the merits.

On the need for provisional measures in the case, the Court reiterated its earlier jurisprudence from *Breard* and *LaGrand*. Provisional measures may be granted by the Court to preserve “the rights which may subsequently be adjudged by the Court . . . .” *Id.* at para. 48 (*quoting* Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Provisional Measures, Order of 15 March 1996, I.C.J. Reports 1996 (I), p. 22, para. 35). They are only justified “if there is urgency in the sense that action prejudicial to the rights of either party is likely to be taken before such final decision is given.” *Id.* at para. 50 (*quoting* Passage through the Great Belt (Finland v. Denmark), Provisional Measures, Order of 29 July 1991, I.C.J. Reports 1991, p. 17, para. 23).

While Mexico sought an order that would ensure *no* Mexican national was executed and that no execution date was set, the Court declined to accept such a broad request. The Court noted that its jurisdiction was limited to an actual dispute between Mexico and the United States concerning the interpretation and application of the Vienna Convention with regard to the 54 individuals named in the Application. Accordingly, the Court could not rule on the rights of other Mexican nationals

who were not alleged to have been victims of a violation. In contrast, the Court found it could proceed to consider provisional measures with respect to the 54 named individuals. It did so even though no execution dates had been fixed in any of their cases. The Court found that the absence of execution dates should not preclude it from considering whether it should indicate provisional measures in light of the “rules and time-limits governing the granting of clemency and the fixing of execution dates” in the United States. *Id.* at para. 54.

Of these 54 named individuals, the Court found that three of them – César Roberto Fierro Reyna, Roberto Moreno Ramos, and Osvaldo Torres Aguilera – faced the risk of execution in the coming weeks or months. Moreover, such executions “would cause irreparable prejudice to any rights that may subsequently be adjudged by the Court to belong to Mexico . . . .” *Id.* at para. 55. Accordingly, the Court found that it would be appropriate to indicate provisional measures with respect to these three individuals. In contrast, the other 51 named individuals did not face the same risk of imminent execution. Thus, the Court declined to indicate provisional measures with respect to these other individuals although it reserved the right to do so if necessary.

For these reasons, the Court found that the circumstances surrounding the case constituted a matter of the greatest urgency and, therefore, required the indication of provisional measures. The Court then 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.<sup>9</sup>

*Id.* at para. 59.

On February 5, 2003, the ICJ established the time limits for filing the Memorials, which were subsequently revised. Pursuant to the revised schedule, Mexico was to submit its Memorial on June 20, 2003, and the United States was to submit its Counter-Memorial on November 3, 2003. Public hearings are scheduled for December 15-19, 2003.

#### IV. Implications of *Avena*

The *Avena* case stands firmly on the foundation laid by the International Court of Justice in *Breard* and *LaGrand*. See Verbatim Record, *supra*, at CR 2003/1, para. 49 (statement of Alberto Székely). On matters of both procedure and substance, *Avena* is clearly influenced by the Court's earlier rulings in these cases.

The *Avena* case evinces the newly affirmed nature of provisional measures orders. In *Breard* and *LaGrand*, the binding nature of provisional measures orders remained unclear, as evidenced by the language used in these orders. In its provisional measures order in *LaGrand*, for example, the Court indicated that “[t]he United States of America *should* take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings . . . .” *LaGrand* Order, *supra*, at para. 29 (emphasis added). The Court's subsequent judgment on the merits in *LaGrand*, however, removed any doubt regarding the nature of the Court's provisional measures orders, holding that these orders are binding. This explains the mandatory language used by the Court in the *Avena* order, which provides that “[t]he 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 . . . .”<sup>10</sup> *Avena* Order, *supra*, at para. 59 (emphasis added).

On matters of substance, the *Avena* case is also influenced by the legacy of *Breard* and *LaGrand*. In *LaGrand*, the Court crafted a remedy that granted the United States a margin of appreciation in implementing its obligations under the Vienna Convention.<sup>11</sup> If the United States failed to provide consular notification, “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.” *LaGrand* (Ger. v. U.S.) (Int'l Ct. Justice June 27, 2001), *reprinted in* 40 ILM 1069 (2001), at para. 125. Because this obligation could be fulfilled in various ways, the choice of means was left to the United States.

As evidenced during the public hearings in *Avena*, the Court will need to clarify the meaning of “review and reconsideration” when it hears the merits of the case.<sup>12</sup> Throughout the public hearings on Mexico's petition for provisional measures, the United States argued that clemency review would comply with the Court's holding in *LaGrand* because it provided the opportunity for review and reconsideration of Vienna Convention violations.<sup>13</sup> In contrast, Mexico argued that clemency review alone is an insufficient remedy. Rather, “international law requires the provision of a remedy *at law* allowing for redress of Vienna Convention violations – not the hope of executive grace, but the right to legal review.” Verbatim Record, *supra*, at CR 2003/1, para. 100 (statement of Donald Donovan) (emphasis in original).

If the Court seeks to ensure that states provide genuine relief for Vienna Convention violations, it must provide a more detailed and outcome-oriented description of how violations can be remedied. Such precision appears to be precisely what the United States does not want, however, as evidenced by its statements during the public hearings. *Id.* at CR 2003/2, para. 3.45 (statement of James Thessin). It appears,

though, that clemency review alone is an insufficient remedy when it fails to provide any form of relief.

Mexico has requested a restoration of the *status quo ante* – presumably seeking new trials or, at a minimum, new sentencing hearings. It has also sought to ensure that procedural default rules are not used to preclude claims of Vienna Convention violations. Because the Mexican nationals in *Avena* have not yet been executed, they could benefit from such rulings. This outcome was unavailable in *LaGrand* since both German nationals had already been executed prior to the Court’s judgment on the merits.

## V. Conclusion

The *Avena* case provides the International Court of Justice with a unique opportunity to clarify its prior ruling in *LaGrand*. Its need to do so stems, in part, from the Court’s desire in *LaGrand* to craft a judgment that provided the United States with some deference in how to implement treaty obligations. The *Avena* case reveals the ambiguity of the *LaGrand* judgment and suggests, perhaps, the perils of such compromise.

## Endnotes

<sup>1</sup> The pleadings, decisions, and basic documents of the International Court of Justice are available online at <<http://www.icj-cij.org>>.

<sup>2</sup> Article 36(1) of the Vienna Convention provides “[w]ith a view to facilitating the exercise of consular functions relating to nationals of the sending State:”

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

with respect to communication with and access to consular officers of the sending State;

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

<sup>3</sup> Mexico has 45 consulates in the United States.

<sup>4</sup> In 2000, Mexico requested an advisory opinion from the Inter-American Court of Human Rights concerning the right of consular assistance. *See The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Inter-American Court of Human Rights, Advisory Opinion No. OC-1/99 (1999).

<sup>5</sup> The Mexican Application provided detailed information about each of the 54 cases.

<sup>6</sup> On January 20, 2003, Mexico withdrew its request for provisional measures on behalf of three of the 54 Mexican nationals because their death sentences had been commuted.

<sup>7</sup> Mexico was represented by Juan Manuel Gomez Robledo, Santiago Onate, Alberto Székely, Sandra Babcock, and Donald Donovan. The United States was represented by William H. Taft, IV, Stephen Mathias, Catherine Brown, James Thessin, Elihu Lauterpacht, and Daniel Collins.

<sup>8</sup> Judge Oda attached a separate Declaration to the Court’s Order. While he voted in favor of the Order, he expressed his doubts concerning the existence of any dispute arising out of the interpretation or application of the Vienna Convention.

<sup>9</sup> The Court added that it would seek to reach a final judgment “with all possible expedition.”

<sup>10</sup> Similarly, the *Avena* order provides that “[t]he Government of the United States of America shall inform the Court of all measures taken in implementation of this Order.” (emphasis added).

<sup>11</sup> See generally Note, *Too Sovereign But Not Sovereign Enough: Are U.S. States Beyond the Reach of the Law of Nations?*, 116 HARV. L. REV. 2654 (2003); Sean D. Murphy, *Implementation of ICJ’s LaGrand Decision*, 97 AM. J. INT’L L. 180 (2003); William J. Aceves, *International Decisions: LaGrand*, 96 AM. J. INT’L L. 210 (2002).

<sup>12</sup> U.S. courts have continued to struggle with the implications of Vienna Convention violations. See, e.g., *Bieregu v. Ashcroft*, 259 F. Supp. 2d 342, 348 (D. N.J. 2003); *Commonwealth v. Diemer*, 57 Mass. App. Ct. 677, 684-685 (2003); *United States ex rel. Madej v. Schomig*, 223 F. Supp. 2d 968 (N.D. Ill. 2002); *Valdez v. Oklahoma*, 46 P.3d 703 (Okla. Crim. App. 2002).

<sup>13</sup> In the case of Gerardo Valdez, a Mexican national sentenced to death in Oklahoma, the U.S. Department of State sent a letter to the Governor of Oklahoma, asking that he consider the Vienna Convention violation as part of his clemency review. In announcing the denial of clemency, Governor Frank

Keating noted that he had conducted a “review and reconsideration of Mr. Valdez’s conviction and sentence by taking account of the admitted violation of Article 36 of the Vienna Convention” but that this violation, while “regretful and inexcusable,” did not affect the outcome of the trial. Letter from Frank Keating, Governor of Oklahoma, to Vicente Fox Quesada, President of Mexico 1-3 (July 20, 2001), quoted in Sean D. Murphy, *Department of State Letter to U.S. Court After LaGrand Decision*, 96 AJIL 461 (2002).