

***Avena and Other Mexican Nationals: How the
International Court of Justice Lost its Crown***
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Avena was the third case presented to the International Court of Justice challenging the United States' adherence to the Vienna Convention on Consular Relations in respect of foreign nationals on death row in the United States.¹ The first case, submitted by Paraguay, was withdrawn from the Court's docket after the provisional measures stage.² The second, filed by Germany in respect of the LaGrand brothers, proceeded to the merits but both brothers were executed prior to the judgment being rendered.³ *Avena* was different. The 52 Mexican nationals sentenced to death in nine different states of the US were all alive when the Court issued its judgment. Only three of those nationals had exhausted all judicial avenues of appeal in the United States whereas the other 49 were at different stages of proceedings before both state and federal courts.⁴

As such, *Avena* squarely confronted the connection between international law obligations and the operation of a state's domestic laws. The United States' criminal justice system was necessarily implicated in this case not only because of the very nature of the primary substantive obligations but also because of the type of remedies sought and awarded as reparations for the United States' violations of international law. Given the many facets of this case that confront the international / domestic law intersection,⁵ my intention here is to canvas briefly the substantive international obligations and their relationship to the domestic sphere, and then focus on the reparations decision of the judgment. With regard to reparations, the key questions are where the Court drew the line between international and domestic law remedies, and whether it drew it in the right spot. From this analysis, the implications of this decision for the enforcement of the judgment in the United States can then be considered.

Article 36 of the Vienna Convention was at issue in *Avena*, as well as the two earlier cases. In a nutshell, Article 36(1) requires detained or arrested foreign nationals to be informed of their right to contact their consulate and the consulate is entitled to be notified of the arrest or detention of one of its nationals.⁶ Article 36(2) requires each

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¹ Case Concerning *Avena and Other Mexican Nationals* (Mexico v. U.S.), Judgment, 2004 I.C.J. (Mar. 31) [hereinafter "*Avena*"].

² Case Concerning the Vienna Convention on Consular Relations (Paraguay v. U.S.), Request for the Indication of Provisional Measures, Order, 1998 I.C.J. (Apr. 9); Case Concerning the Vienna Convention on Consular Relations (Paraguay v. U.S.), Discontinuance, Order, 1998 I.C.J. (Nov. 10).

³ *LaGrand Case* (Germany v. U.S.), Judgment, 2001 I.C.J. (June 27) [hereinafter "*LaGrand*"].

⁴ *Avena*, para. 20.

⁵ For example, the United States challenged the admissibility of Mexico's application alleging that Mexico had failed to exhaust local remedies, as well as contending that the Court lacked jurisdiction because Mexico's pleadings and submissions fundamentally addressed the United States criminal justice system as a whole. *Avena*, paras 38-40 and paras 27-28, respectively.

⁶ Article 36(1)(b) reads: "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

state party to give full effect to these obligations in its laws and regulations.⁷ These are clearly international obligations that directly prescribe the conduct of a state's law enforcement officials.

So, for example, with respect to Article 36(1), the law enforcement officials are required to tell a foreign national of their right to have their consulate advised of their arrest or detention "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".⁸ Given the melting pot nature of the United States, the Court considered that the advice would need to be given routinely and went so far as to suggest that it could be incorporated into what is known as the *Miranda* warning, whereby a police officer sets out an accused's constitutional rights upon arrest.⁹ The result of this proposal would mean that because of an international obligation, arresting officers would recite, "You have the right to remain silent, the right to have an attorney present during questioning... If you are a foreign national, you have the right to contact your consulate."

To give full effect to the purposes of Article 36(1), as required by Article 36(2), the Court revisited the application of the procedural default rule.¹⁰ This rule is applied in United States courts to prevent a legal issue that was not raised at trial from being argued in later proceedings.¹¹ Consistent with its holding in *LaGrand*, the Court again stated that provided there was still an opportunity to provide review and reconsideration of the Article 36(1) violations, then Article 36(2) was not violated through the specific application of the procedural default rule.¹² The Court therefore found that Article 36(2) was only violated in respect of the three Mexican nationals who had exhausted all judicial avenues.¹³

Having found that the United States had violated Article 36(1) and (2), the Court turned to the question of reparations. In particular, the Court asked what is the "reparation in adequate form" that corresponds to the injury?¹⁴ Given that the Court had addressed particular aspects of the US criminal justice system in respect of the primary obligations, the natural consequence, it seemed, was for the Court to consider a remedy that would also be afforded within the domestic judicial system. To this end, the International Court found that it was the United States courts that had to

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."

⁷ Article 36(2) reads: "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."

⁸ *Avena*, para. 88. *See also id.*, para. 63.

⁹ *Avena*, para. 64.

¹⁰ *Avena*, para. 107 *et seq.*

¹¹ The Court adopted Mexico's definition of the procedural default rule, which had not been contested by the United States: "a defendant who could have raised, but failed 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*". *Avena*, para. 111.

¹² *Avena*, para. 112.

¹³ *Avena*, para. 114.

¹⁴ *Avena*, para. 119.

determine through review and reconsideration “whether in each case the violation of Article 36 committed ... caused actual prejudice to the defendant in the process of administration of criminal justice”.¹⁵ What is crucial for review and reconsideration, according to the Court, is not the outcome of this process but whether a domestic judicial procedure exists that guarantees that full weight is given to the violation of consular rights.¹⁶

From this analysis, it would seem that the relationship between international law and domestic law could not be closer. The primary obligations set forth in the Vienna Convention determined the conduct of law enforcement officials with respect to consular rights and then any violation of these obligations were to be remedied through domestic courts.

But if there is an international law violation, which the Court did find, then isn't it the International Court that should determine whether a breach of international law has caused an injury and what relief is available to remedy that injury? Did the International Court abandon its responsibility in favour of the US courts?

If the Court had examined for itself what injury was caused to the Mexican nationals, it may well have found itself in the position of assessing and perhaps criticizing the accuracy or fairness of their convictions and sentences. From this causation analysis, the Court could then have reached the point that the injury caused was an unfair trial or tainted legal proceeding and that it should be annulled as “reparation in adequate form”. This was the position argued for by Mexico.¹⁷ Instead, the Court stopped after finding there was a breach of treaty and turned the matter over to the domestic courts. Perhaps it is not surprising that the International Court did not want to engage in its own causation and injury assessment. Yet given the Court's purported role in international dispute settlement, it would seem to have been unduly deferential to the workings of the domestic court systems.

Ostensibly, the Court did order reparations. It ordered a review and reconsideration procedure as it did in *LaGrand*.¹⁸ All the Court had to clarify in *Avena* was that it really meant in *LaGrand* that there had to be judicial review and reconsideration, and the United States could not just rely on the executive clemency procedures as currently practiced.¹⁹ The problem here, as Mexico pointed out to the Court, is that when the Court discussed review and reconsideration in *LaGrand* it did so in the context of the primary obligations of states under the Vienna Convention.²⁰ In failing to permit review and reconsideration of the convictions and sentences of the LaGrand brothers, the Court found that the United States had breached Article 36(2).²¹ Since the LaGrand brothers had already been executed, the only remedy that Germany could seek from the United States were assurances that the United States would not again fail to provide review and reconsideration in similar circumstances.

¹⁵ *Avena*, para. 121.

¹⁶ *Avena*, para. 139.

¹⁷ Memorial of Mexico (June 20, 2003), Chapters 5 and 6.

¹⁸ *Avena*, paras 120-121.

¹⁹ *Avena*, paras 140 and 143.

²⁰ See *Avena* Oral Transcript, CR2003/28, paras 121-137.

²¹ *LaGrand*, para. 128(4).

The situation was different in *Avena* – all 52 Mexican nationals were alive when the Court issued its judgment. For the violations of the primary obligations, the Court should have turned to the secondary rules of state responsibility that come into play when a primary obligation is breached.²² In deferring to domestic processes, it could at best be said that the International Court has morphed the primary obligation of review and reconsideration into an international remedy. At worst, the International Court’s failure to distinguish between international remedies for international law violations and domestic procedures required as part of a substantive treaty obligation is an abdication of the International Court’s role.

The confusion in blurring the line between primary and secondary obligations, and resultant emphasis on domestic court proceedings over international judicial decision-making, is manifest in the Court’s holding in respect of the three Mexican nationals who have exhausted judicial avenues of appeal. As mentioned, the Court found that the failure to provide judicial review and reconsideration was a breach of Article 36(2), the primary obligation.²³ And what does the International Court determine is an adequate form of reparation for this internationally wrongful act? “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”.²⁴

Given the International Court’s abdication, it becomes necessary to consider what the United States has actually done to enforce the *Avena* judgment, particularly in respect of the three nationals who must turn to the United States to find “an appropriate remedy”.

About a month prior to the International Court’s judgment of March 31st, the Oklahoma Court of Criminal Appeals set an execution date of May 18 for Osbaldo Torres.²⁵ On May 13, the same Oklahoma court halted his execution and ordered that Mr. Torres was entitled to a new hearing so that he could argue that he had been harmed by the United States’ violations of his consular rights.²⁶ Within hours of the court’s decision, the Oklahoma governor commuted Mr. Torres’ death sentence to life without parole.²⁷

It would seem that the International Court was perhaps vindicated in deferring to the United States’ criminal justice system to remedy the Vienna Convention violations. The extent that it was justified in so doing is still questionable, however, in light of the specially concurring opinion of Judge Chapel, as well as the opinion of the two dissenting judges.

Judge Chapel considered that the United States courts were bound by the *Avena* judgment,²⁸ and particularly were required to review Mr. Torres’ conviction and sentence in light of the Vienna Convention violations on the merits. In his first

²² See *Avena* Oral Transcript, CR2003/28, para. 130.

²³ *Avena*, para. 152.

²⁴ *Id.*

²⁵ *Avena*, para. 21.

²⁶ *Torres v. Oklahoma*, Order Granting Stay of Execution and Remanding Case for Evidentiary Hearing, May 13, 2004.

²⁷ Adam Liptak, *Execution of Mexican is Halted*, NY TIMES, A23 (May 14, 2004).

²⁸ He reasoned that the *Avena* judgment was “the product of the process set forth in the Optional Protocol” and the Oklahoma court was therefore bound by both the treaty and the judgment.

footnote, however, Judge Chapel distinguishes this case from an earlier Oklahoma decision, *Valdez v. State*. There, no review and reconsideration was permitted on the basis that Valdez was attempting to rely on the *LaGrand* judgment where neither Valdez nor the complaining government were parties in *LaGrand*, and the International Court had not specifically addressed Valdez's case.

This distinction is quite problematic because at the end of its judgment in *Avena*, the International Court signalled clearly that it has had enough of these cases and that its findings in *Avena* applied *a contrario* to other foreign nationals finding themselves in similar situations in the United States.²⁹ Judge Chapel's footnote would seem to negate the International Court's attempt to set out ongoing principles for application by domestic courts in the United States. He would appear to suggest that it is only the 52 Mexican nationals, or maybe only the three whose rights under Article 36(2) were violated, who may now benefit from the Court's judgment rather than any other foreign national whose consular rights are or have been similarly violated.

The dissenting judges then provide the views that must be anticipated in other United States domestic courts. Namely, that *Avena* was not binding on the Oklahoma court, and that it could not in any event revive a stale claim that was now barred by *res judicata* and waiver. For the dissent, it was sufficient that Torres had been afforded adequate due process as tested and determined throughout the appeals process. These were the very judicial attitudes that were challenged by Mexico in *Avena*. The International Court made some headway in denouncing the application of domestic rules and practices that preclude judicial review and reconsideration of Vienna Convention violations. On balance though, the Court has leaned too far in favour of domestic court decision-making and thereby abdicated its own responsibility – which is why I believe the International Court lost its crown.

²⁹ *Avena*, para. 151.