AALS Panel – *Mexico v. U.S.A.* (Avena) – Arguments of Mexico

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A. Introduction

I have had the privilege of serving as part of the team from Debevoise & Plimpton LLP headed by Donald Francis Donovan.[1] The Debevoise team worked in close collaboration with the Director of the Mexican Capital Legal Assistance Program, Sandra L. Babcock, and Mexican Ambassador Juan Manuel Gómez-Robledo and his foreign ministry staff to represent Mexico before the International Court of Justice.

With this article I would like to elucidate the perspective of Mexico in instituting the proceedings before the International Court of Justice (ICJ) that have become known as the *Avena* case.[2]

Before delving into the heart of the issues, I would like to make some preliminary observations to provide some context for the proceedings. Mexico has the most comprehensive consular presence in the United States of any country, with over forty-five consulates and hundreds of consular officers trained specifically to inter-

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[1] Other Debevoise colleagues working on the case included Katherine Birmingham Wilmore, Dietmar W. Prager, Natalie S. Klein and Thomas J. Bollyky.

[2] Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America) (hereafter "Avena case").

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vene on behalf of Mexican nationals detained in capital proceedings.[3] Mexican consular officers perform all the functions contemplated by Article 36 of the Vienna Convention on Consular Relations (Vienna Convention)[4], including the arranging of legal representation, serving as a "cultural bridge" for Mexican nationals unfamiliar with United States criminal procedures, amassing crucial mitigating evidence for the penalty phase, and even hiring defense experts where needed. At the core of Mexico's position is the belief that consular rights are necessary to the guarantee of due process by addressing the inherent disadvantages faced by any foreign national in unfamiliar criminal proceedings. In short, Mexico has taken and continues to take the role of consular officers in ensuring the fairness of criminal proceedings against Mexican nationals very seriously as a top governmental priority.

By late 2002, Mexico had become increasingly frustrated with the United States' lack of compliance with the Vienna Convention, particularly in death penalty cases against Mexican nationals. In cases where United States authorities had not complied with Article 36 notification provisions and Mexico had been prevented from rendering consular assistance, consular officers routinely assist defense counsel in raising violations of the Vienna Convention at trial, the appellate level, or, where all else had been exhausted, at clemency proceedings. Mexico itself would regularly

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[3] Mexico's history of consular assistance in the United States dates back to the turn of the century. *See* Memorial of Mexico in Avena,11-13, available at: <http://212.153.43.18/icjwww/idocket/imus/imusframe.htm> (hereafter "Memorial of Mexico").

[4] Vienna Convention on Consular Relations, 24 April 1963, Art. 36, 21 UST 71, 596 UNTS 261 (hereafter "Vienna Convention"). Article 36 of the Vienna Convention provides:

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 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 judgement. 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.

lodge formal protests and diplomatic demarches. But despite all the raising of objections and interventions, Mexico could detect no change in the United States' compliance with the Vienna Convention or with the ICJ's judgment in the *LaGrand* case.[5]

Indeed, the message of the United States court opinions and diplomatic communications filed since *LaGrand* was clear. Mexico was told again and again that procedural default applies to prevent the consideration of the Vienna Convention violation on the merits, that there is no judicial remedy available or prejudice possible even when there is a violation, and that all Mexico realistically could expect was to receive an apology after the fact of execution. Both before and after the ICJ's decision in *LaGrand*, not one United States court has attached any legal significance whatsoever to any violation of the Vienna Convention, no matter the circumstance.[6]

It is against this backdrop that Mexico decided to file its Application in January of 2003.[7] I should mention two things at the outset. First, Mexico did not take this step lightly; it is no small thing to initiate proceedings in the ICJ, particularly against the United States, a country with which Mexico has very close social and economic ties. Second, while this case is highly politicized because it concerns the imposition of the death penalty within the United States, Mexico, like Germany before it, does not question the legality of the death penalty in the United States. Mexico does take the position however, that when a country imposes this ultimate penalty, it must do so with due regard for the strictest adherence to guarantees regarding the legality of the proceedings, including those falling under the province of international law.

B. Analysis of the Arguments

I. Provisional Measures

Concurrent with the filing of its Application, Mexico requested provisional measures of protection for fifty-two Mexican nationals in danger of execution pending a judgment on the merits by the ICJ.[8] After a hearing in late January, the ICJ did

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[5] LaGrand (Germany v. United States of America), Merits, Judgment, ICJ Reports 2001 (hereafter "LaGrand Judgment").

[6] *See* Memorial of Mexico, in Avena, 47-65.

[7] *See* Application, Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America), available at: <http://212.153.43.18/icjwww/idocket/imus/imusorder/imus_iapplication_20030109.PDF>.

[8] Request for the Indication of Provisional Measures of Mexico, in Avena (filed 9 Jan. 2003).

grant provisional measures for the three nationals in the most imminent danger of execution, but it was a significant victory in one other major respect—the specific wording of the ICJ's order in the *Avena* case.

In the *LaGrand* Order of provisional measures, the ICJ ordered that the United States must take "all measures at its disposal" to ensure that the LaGrand brothers were not executed pending a final judgment on the merits.[9] The LaGrand brothers were nevertheless executed by the State of Arizona as scheduled. In *Avena*, after hearing Mexico's argument and likely, in light of the fact of the previous executions of the LaGrand brothers, the ICJ this time ordered the United States to take "all measures necessary" to ensure that the Mexican nationals were not executed pending a final judgment.[10]

The ICJ's substitution of the word "necessary" for "at its disposal" is a deliberate choice designed to dismiss any argument by the United States that its federal structure prevents it from exercising the necessary degree of control to stop state executions.

II. The Merits

Mexico has alleged that the United States has violated its sovereign rights and the rights of the fifty-two Mexican nationals under Article 36 of the Vienna Convention by failing to inform the nationals of their rights to consular assistance without delay and by failing to provide meaningful "review and reconsideration" of the conviction and sentence taking account of the violation, as required by the *LaGrand* decision.[11]

On its face this case would appear to be no different from *LaGrand* in terms of the violations alleged. *LaGrand* was indeed the starting point for nearly all of the arguments, but the *Avena* case presents new questions that require a revisiting and fleshing out of the ICJ's judgment in *LaGrand* in several important respects. One of my colleagues commented at one point, and I think it apropos, that the *Avena* case is essentially a fight for the soul of *LaGrand*.

[9] LaGrand (Germany v. United States of America), Order, ICJ Reports 1999, 9, para. 29(I)(a) (Mar. 3).

[10] Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America), Order, ICJ Reports 2003, para. 59(I)(a) (Feb. 5).

[11] LaGrand Judgment, para. 125.

I will address what in my mind are the three most important, contentious, and until now, unconsidered questions raised by the *Avena* case:

- First, what interpretation of the phrase "without delay" gives meaning to the object and purpose of Article 36?[12]

- Second, do executive clemency proceedings satisfy the *LaGrand* court's mandate of "review and reconsideration"?

- And third, what does it mean to restore the *status quo ante* here, where unlike the LaGrand brothers, all fifty-two Mexican nationals remain alive?

1. Without Delay

I turn first to the meaning of the phrase "without delay" with regard to the three Article 36 requirements—the provision of consular information; the notification of the consulate if so requested by the national; and the facilitation of consular access.

The United States's position is that a subjective definition of "without delay" suffices; that is, Article 36 is satisfied as long as the arresting authorities notify in the ordinary course of business and do not engage in any deliberate delay or procrastination in the provision of consular information to the foreign national and if requested, in consular notification and access. Mexico disagrees. The *LaGrand* court has already found that the rights and obligations of Article 36 constitute what it has called an "inter-related regime" directed to the goal of "consular protection."[13] It is Mexico's position that in order for the purpose of consular protection to be given any real meaning, "without delay" must mean immediately and before any step of the criminal prosecution process that could compromise the rights of the national—and specifically in the context of United States criminal proceedings, that means before interrogation.

There is a world of difference between the two interpretations. If any of us here were arrested and sitting in a Turkish prison, for example, afraid and completely

[12] Article 36(1)(b) provides: "if [the detained national] 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." (emphasis added).

[13] LaGrand Judgment, para. 74.

ignorant of the Turkish criminal process, I think we would fully appreciate the difference between having the right to seek the advice and protection of the United States consulate immediately or, as the United States' position would have it, whenever the Turkish officials decided was appropriate in the "ordinary course of business without procrastination"—whatever that means.

I should mention that Mexico's interpretation is not unprecedented. In 1999, the Inter-American Court of Human Rights in an advisory opinion commonly referred to as OC-16[14] came to the same conclusion, and according to the United States's own survey of state practice, a handful of state parties apply exactly the interpretation Mexico advocates.[15]

2. Clemency Proceedings

Second, I turn to the dispute surrounding clemency proceedings in capital cases. In *LaGrand*, the Court had occasion to closely analyze the obligations imposed by the "full effect" language of Article 36(2)[16] and came to the conclusion that in future cases of Vienna Convention violations, Article 36(2) requires the "review and reconsideration" of the criminal conviction and sentences in light of that violation.[17] The United States has taken the position that it does not matter if United States *courts* still do not attach any legal significance to violations of the Vienna Convention, since the United States has made a conscious choice to focus on executive clemency proceedings as the means to fully satisfy the required review and reconsideration.

Executive clemency is a system in which relief from the death penalty is granted by state governors as a matter of executive grace and has been aptly described by United States Supreme Court Chief Justice William Rehnquist as "simply a unilateral

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[14] The Right to Information on Consular Assistance in the Framework of the Guarantees of Due Process of Law, Advisory Opinion OC-16/99 of 1 October 1999, Series A, No. 16, para. 106.

[15] See Speech of Mr. Donovan, Merits Hearing, in Avena, CR 2003/24 , at 61, para. 215 (noting that U.S. survey reveals a diverse group of states comprised of Brazil, Korea, Iceland, Ireland, Kenya, Denmark, Spain and Turkey that act in accord with Mexico's interpretation), available at <http://212.153.43.18/icjwww/idocket/imus/imusframe.htm>.

[16] Article 36(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." (emphasis added).

[17] LaGrand Judgment, para. 125.

hope" for mercy.[18] It is a standardless, secretive and virtually unreviewable process where decisions are made without hearing, often without discussion between clemency board members and are subject to the whim of political considerations.[19]

In light of these facts, Mexico has argued that clemency simply cannot serve as an adequate surrogate for judicial review and reconsideration as the United States would have it. Mexico's position is founded in the jurisprudence of international tribunals that have concluded upon a close examination of clemency procedures that the mere opportunity to ask for mercy cannot substitute for judicial review of errors that affected legal proceedings.[20]

Perhaps most surprising at the ICJ hearings was the United States' use of the recent blanket clemency to all death row prisoners by Governor Ryan of Illinois as an example of a well-functioning clemency system. It is true that the clemency decision resulted in the commutation of sentence for three of the fifty-two Mexican nationals, but were they a result of a considered review of the Vienna Convention violation? No. Governor Ryan, in what some have described as a "crisis of conscience," commuted all 167 death sentences, regardless of the claims and even regardless of whether the individual had applied for clemency at all.[21] This was not the review and reconsideration in light of Article 36 violations that the *LaGrand* court appeared to have in mind. Governor Ryan's actions merely reinforce the haphazard and completely discretionary nature of clemency.

3. Remedies

Now I turn to my third and last point on remedies. Mexico has asked for a declaration annulling or otherwise depriving of legal effect the sentences and convictions of the fifty-two nationals as a means of restoring the *status quo ante*, or the situation that existed prior to the occurrence of the wrongful act.[22]

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[18] Ohio Adult Parole Authority v. Woodard, 523 US 272, 280 (1998) (*citing* Connecticut Bd. of Pardons v. Dumschat, 452 U.S. 458, 465 (1981)).

[19] *See generally* Memorial of Mexico, 101-115.

[20] *See* Speech of Ms. Babcock, Merits Hearing, in Avena, CR 2003/25, 11, para. 264, available at <http://212.153.43.18/icjwww/idocket/imus/imusframe.htm>.

[21] *See, e.g.*, Agence France-Presse, US Governor Overturns 167 Death Sentences in Momentous Blanket Clemency; 12 January 2003; Ryan Kieth, Court: Gov. Could Commute Death Sentences, Chicago Tribune, 23 Jan. 2004.

[22] *See* Commentary to Art. 35 of the Articles on State Responsibility, para. 2; see Memorial of Mexico, 150-152.

Mexico bases its request on the substantial body of international law that holds that a state may request that a judicial act not in conformity with public international law be annulled. Mexico's Memorial and the transcript of the oral proceedings contain the relevant cites for those interested.[23]

Mexico's request is also founded in its belief in the essential character of the rights to consular assistance and access as a necessary prerequisite for the exercise of due process guarantees in a criminal proceeding. The key question in the *Avena* case is whether consular assistance plays a critical role in ensuring a level playing field for foreign nationals by ensuring a foreign national defendant's understanding and meaningful exercise of his or her due process rights. If the answer is yes, as Mexico argues it must be, then the lack of such assistance, particularly in a death penalty case, taints the proceedings to such an extent that fundamental fairness demands annulment.

In many ways, the lynchpin of the debate on remedies between Mexico and the United States is the import and significance of the *LaGrand* Court's conclusion of "review and reconsideration." The United States argues that review and reconsideration is the only remedy available for violations of article 36(1) and (2).[24] However, a close look at the *LaGrand* judgment makes clear that the *LaGrand* court intended review and reconsideration not to be a wholesale international law remedy, but to be a primary obligation under Article 36(2); that is, an obligation for a state's municipal legal system to provide.[25] As a primary obligation, it does not displace the rules of state responsibility for the provision of international remedies. Therefore, review and reconsideration is not the answer to the remedy question, as the United States argues. The ICJ is facing a blank slate, and it remains to be seen whether the international law remedy of *restitutio in integrum* requires annulment.

C. Conclusion

I will end with a final thought. The implications of this case for due process and the remedies appropriate for tainted criminal proceedings are tremendous. I began by stating that this case is not a challenge *per se* to the legality of the death penalty.

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[23] *See* Memorial of Mexico, 150-166; Speech of Mr. Donovan, Merits Hearing, in Avena, CR 2003/25, 34-41, paras. 347-375, available at <http://212.153.43.18/icjwww/idocket/imus/imusframe.htm>.

[24] *See* Counter-Memorial of the United States, 178-186, available at <http://212.153.43.18/icjwww/idocket/imus/imusframe.htm>.

[25] *See* Memorial of Mexico, 150-166; Speech of Mr. Donovan, Merits Hearing, in Avena, CR 2003/28, 39-42, paras. 121-137, available at <http://212.153.43.18/icjwww/idocket/imus/imusframe.htm>.

However, it is an inescapable fact that when the ICJ pronounces its judgment in this case, it may have repercussions on the circumstances in which a country can legally impose the death penalty; that is, only where the most rigorous standards of fairness and legality of international jurisprudence are scrupulously followed.